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Common Pleas Division.

REPORTED BY

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BARRISTERS-AT-LAW;

AND

IN THE COURT OF APPEAL

BY

HENRY HOLROYD AND JOHN EDWARD HALL,
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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Alliance Bank of Simla *v.* Carey	429
Anderson, Wagstaff *v.*	171
Andrade, Lazarus *v.*	318
Arbuthnot, Norfolk (Duke of) *v.* (C. A.)	390
Aveland (Lord) *v.* Lucas	211
——— *v.* ——— (C. A.)	351

B.

Barnes, Elphick *v.*	321
Baylis, Picard *v.*	235
Beatson, Yorkshire Banking Company *v.* (C. A.)	109
Bennett *v.* Lord Bury	339
Betteley, Hamlyn *v.*	327
Brett *v.* Clowser	376
Brighton (Mayor of) *v.* Guardians of Brighton	368
Brunswick Benefit Building Society, Chapleo *v.*	331
Budd *v.* Marshall (C. A.)	481
Burke *v.* South Eastern Railway Company	1
Burliner *v.* Royle	354
Burnand *v.* Rodocanachi	424
Bury (Lord) Bennett *v.*	339
Byrne *v.* Van Tienhoven	344

C.

Capital and Counties Bank *v.* Henty (C. A.)	514
Carey, Alliance Bank of Simla *v.*	429
Carr, Manchester Bonded Warehouse Company, *v.*	507
Cartwright, Pierpoint *v.*	139
Castle *v.* Downton	56
Chapleo *v.* Brunswick Benefit Building Society	331
Chapman *v.* Knight	308
Chesworth *v.* Hunt	266
Clarke, Gothard *v.*	253
Clowser, Brett *v.*	376
Collins *v.* Price	544
——— *v.* Welch (C. A.)	27
Cooper, Jupp *v.*	26
Corbet *v.* Haigh	50

	PAGE
Corsten, Godden *v.*	17
Cropper, Hall *v.*	76
D.	
Davis *v.* Goodman	20
—— *v.* —— (C. A.)	128
Dicker, Lucas *v.*	150
Ditcham *v.* Worrall	410
Drew, Ford *v.*	59
——, Porter *v.*	143
Downton, Castle *v.*	56
E.	
Elphick *v.* Barnes	321
F.	
Farrer, Mortlock *v.*	73
Ford *v.* Drew	59
Forrester, Wynne *v.*	361
Foster *v.* Medwin	87
Foulkes *v.* Metropolitan District Railway Company (C. A.)	157
G.	
Godden *v.* Corsten	17
Goodman, Davis *v.*	20
——, —— *v.* (C. A.)	128
——, Mayor of Saltash *v.*	431
Gothard *v.* Clarke	253
Guardians of Brighton, Brighton (Mayor of) *v.*	368
Guilsfield (Overseers of) Kenrick *v.*	41
H.	
Haigh, Corbet *v.*	50
Hall *v.* Cropper	76
Hamlyn *v.* Betteley	327
Harper *v.* Scrymgeour	366
Harrison, Spencer *v.*	97
Hayton *v.* Irwin (C. A.)	130
Hayward *v.* Scott	231
Henty, Capital and Counties Bank *v.* (C. A.)	514
Howarth, James *v.*	225
Hunt, Chesworth *v.*	266
I.	
Irwin, Hayton *v.* (C. A.)	130
J.	
James *v.* Howarth	225
Johnson *v.* Rankin	55
Jupp *v.* Cooper	26
K.	
Kenrick *v.* Overseers of Guilsfield	41
Knight, Chapman *v.*	30
L.	
Lazarus *v.* Andrade	31
London and County Bank, Matthiessen *v.*	
London and South Western Railway Company, Phillips *v.* (C. A.)	28
London Joint Stock Bank *v.* Mayor of London	49
London (Mayor of), London Joint Stock Bank *v.*	49
Lonsdale (Lord), Sheward *v.*	4
Lord, Porrett *v.*	6
Lucas, Aveland (Lord) *v.*	21
—— *v.* (C. A.)	35
Lucas *v.* Dicker	15
M.	
MacAllister *v.* Bishop of Rochester	19
McKeand, Taylor *v.*	38

PAGE

Manchester Bonded Warehouse Company *v.* Carr 507
Mander, Wakefield Sanitary Authority *v.* 248
Marshall, Budd *v.* (C. A.) 481
Matthiessen *v.* London and County Bank 7
Medwin, Foster *v.* 87
Metropolitan District Railway Company, Foulkes *v.* (C.A.) 157
Middleton *v.* Simpson 183
Millar, Shanklin Local Board *v.* 272
Mitcalfe, Sullivan *v.* (C. A.) 455
Morgan, Smith *v.* 337
Mortlock *v.* Farrer 73

N.

Neptune Marine Insurance Company, Pellas *v.* (C. A.) 34
Norfolk (Duke of) *v.* Arbuthnot (C. A.) 390

P.

Pellas *v.* Neptune Marine Insurance Company (C. A.) 34
Phillips *v.* London and South Western Railway Company (C. A.) 280
Picard *v.* Baylis 235
Pierpoint *v.* Cartwright 139
Porrett *v.* Lord 65
Porter *v.* Drew 143
Price, Collins *v.* 544

Q.

Quirk, Swansea (Mayor of) *v.* 106

R.

Rankin, Johnson *v.* 552
Rochester (Bishop of), MacAllister *v.* 194
Rodocanachi, Burnand *v.* 424
Royle, Burliner *v.* 354

S.

PAGE

Saltash (Mayor of) *v.* Goodman 431
Scaramanga *v.* Stamp (C. A.) 295
Scott, Hayward *v.* 231
Scrymgeour, Harper *v.* 366
Shanklin Local Board *v.* Millar 272
Sheward *v.* Lord Lonsdale 47
Simpson, Middleton *v.* 183
Smith *v.* Morgan 337
—— *v.* Wilson (C. A.) 25
South Eastern Railway Company, Burke *v.* 1
Spencer *v.* Harrison 97
Stamp, Scaramanga *v.* (C. A.) 295
Sullivan *v.* Mitcalfe (C. A.) 455
Swansea (Mayor of) *v.* Quirk 106

T.

Taylor *v.* McKeand 358
Tenby (Mayor of), Williams *v.* 135

V.

Van Tienhoven, Byrne *v.* 344

W.

Wagstaff *v.* Anderson 171
Wakefield Sanitary Authority *v.* Mander 248
Welch, Collins *v.* (C. A.) 27
Wells *v.* Wren 546
West Bromwich School Board, In re 191
Williams *v.* Mayor of Tenby 135
Wilson, Smith *v.* (C. A.) 25
Worrall, Ditcham *v.* 410
Wren, Wells *v.* 546
Wynne *v.* Forrester 361

Y.

Yorkshire Banking Company *v.* Beatson (C. A.) 109

TABLE OF CASES CITED.

A.

		PAGE
Abergavenny (Earl of) *v.* Brace.	Law Rep. 7 Ex. 145	373, 374
Adansonia Fibre Company, In re Miles' Claim	Law Rep. 9 Ch. 635	120, 125
Agra and Masterman's Bank, In re. Asiatic Banking Corporation, Ex parte	Law Rep. 2 Ch. 391	38
Allen *v.* Richardson	13 Ch. D. 524	388, 389
Amos *v.* Chadwick	4 Ch. D. 869; 9 Ch. D. 459	341, 342, 343, 344
Anderson *v.* Bank of British Columbia	2 Ch. D. 644	107
Angus *v.* Dalton	4 Q. B. D. 162	393
Arnold *v.* The Cheque Bank	1 C. P. D. 578	10, 15
Ashton (Parish of) *v.* Castle Birmidge Chapel	Hob. 66	200
Ashworth *v.* Hopper	1 C. P. D. 178	101, 103
Attorney-General *v.* Brereton	2 Ves. Sen. 425	200, 204
——— *v.* Matthias	27 L. J. (Ch.) 761	436, 449
Austin *v.* Great Western Railway Company	Law Rep. 2 Q. B. 442	169
Avery *v.* Bowden	5 E. & B. 714	350

B.

Bagott *v.* Orr	2 B. & P. 472	438
Bank of Rochester *v.* Monteath	1 Denio, 402	122, 123
Bank of Scotland *v.* Watson	1 Dow. 40	127
Bank of South Carolina *v.* Case	8 B. & C. 427	118
Bastifell *v.* Lloyd	1 H. & C. 388; 31 L. J. (Ex.) 413	132
Baylis *v.* Lawrence	11 A. & E. 920	531
Baxter *v.* Brown	7 M. & G. 198	101, 106
Barker *v.* Aston	F. & F. 191	21
Barlow *v.* Rhodes	1 C. & M. 439, 448	377
Bartlett *v.* Gibbs	5 Man. & G. 81	69, 71
Barwick *v.* English Joint Stock Bank	Law Rep. 2 Ex. 259	334, 377
Beal *v.* Fox	3 C. P. D. 73	60
Beaufort (Duke of) *v.* Mayor, &c., of Swansea	3 Ex. 413	435
Beaver, The	3 C. Rob. 292	296, 301

		PAGE
Beevor *v.* Luck	Law Rep. 4 Eq. 537, at p. 546	268
Belding *v.* Reed	3 H. & C. 955	319, 320
Bellamy *v.* Marjoribanks	7 Ex. 389	10, 15
Bendle *v.* Watson	Law Rep. 7 C. P. 163.	69, 72
Benecke *v.* Frost	1 Q. B. D. 419	207
Bennett *v.* Blain	15 C. B. (N.S.) 518; 33 L. J. (C.P.) 63	101, 106
——— Doe d. *v.* Turner	7 M. & W. 226	373
Bennison *v.* Cartwright	5 B. & S. 1; 33 L. J. (Q. B.) 137	392, 393
Bertie *v.* Beaumont	16 East. 33	373
Bird *v.* Bass	6 M. & G. 143	152
Birkbeck, Ex parte	Law Rep. 9 Q. B. 256	184, 185, 187, 188, 189, 190
Blaauwpot *v.* De Costa	1 Eden. 130	428
Blagg *v.* Sturt	10 Q. B. 899; 906	519, 528
Blakely Ordnance Company, In re. New Zealand Banking Corporation, Ex parte	Law Rep. 3 Ch. 154	38
Bland *v.* Lipscombe	4 E. & B. at p. 713, 14, n.	436
Bliss *v.* Woods	3 Hagg. 486, at p. 514	199, 204
Blount *v.* Harris	4 Q. B. D. 603	56
Bolitho, Ex parte	1 Buck's B. C. 100	118
Bond *v.* Cora, The Brig	2 Wash. C. C. 80	295
——— *v.* Overseers of St. George, Hanover Square	Law Rep. 6 C. P. 312.	61, 64
Bos *v.* Helsham	Law Rep. 2 Ex. 72	387
Bosanquet *v.* Heath	9 W. R. 35	201
Botting, Ex parte. Bostel, In re	Law Rep. 19 Eq. 261.	356
Bright *v.* Walker	1 C. M. & R. 211	392
Bristol and Exeter Railway Company *v.* Collins	7 H. L. 194	158
Brodrick *v.* Scale	Law Rep. 6 C. P. 98	57
Bruce *v.* Jones	1 H. & C. 769; 32 L. J. (Ex.) 132	426
——— *v.* Wait	3 M. & W. 21	501, 502
Bryant *v.* Foot	Law Rep. 2 Q. B. 161, p. 171	438
Buckley, Ex parte. Clarke, In re	14 M. & W. 469	110
Button *v.* O'Neil	4 C. P. D. 354	57, 58

C.

Cann *v.* Cann	3 Sim. 447	389
Carmichael *v.* Brodie	Law Rep. 1 P. C. 454	297, 303
Cassamajor *v.* Strode	19 Ves. 390, n.	103
Cavendish *v.* Greaves	24 Beav. 163.	39
Chapman *v.* Jones	Law Rep. 4 Ex. 273	392
Charlton *v.* Hay	31 L. T. (N.S.) 437	459, 465, 469
Chilton *v.* Corporation of London	7 Ch. D. 735	439, 446, 454
Churton *v.* Frewen	Law Rep. 2 Eq. 634	392
Clayton *v.* Corby	5 Q. B. 415	436
Clifford *v.* Wicks	1 B. & A. 498	392
Cochrane *v.* Rymill	27 W. R. 776	359
Colchester (Mayor of) *v.* Brooke	7 Q. B. 339	437
Colvin *v.* Newberry	1 Cl. & F. 283	177, 180
Conning, Ex parte, Steele, In re	Law Rep. 16 Eq. 414	269
Constable *v.* Nicholson	32 L. J. (C.P.) 240	454

		PAGE
Conway *v.* Nall	1 C. B. 643	154
Cook *v.* Ipswich Local Board of Health	Law Rep. 6 Q. B. 451	274, 275, 276, 278, 279
Cooper *v.* Askew	35 L. T. 347	53
Corland *v.* Ireland	4 W. R. 200	10
Cornell *v.* Hay	Law Rep. 8 C. P. 328	459
Cornfoot *v.* Fowke	6 M. & W. 358	377
Cort *v.* Ambergate, &c., Railway Company	17 Q. B. 127	350
Cosser *v.* Collinge	3 My. & K. 283	146, 149
Cousins *v.* Lombard Bank	1 Ex. D. 404	141, 142, 312
Coventry Petition	19 L. T. 742	547
Coxhead *v.* Mullis	3 C. P. D. 439	411, 412, 416, 418, 421
Cox *v.* Cooper	12 W. R. 75	518, 528
Crocker *v.* Jackson	Sprague R. 141	303
Crosse *v.* Raw	Law Rep. 9 Ex. 209	485, 487, 492
Crowther *v.* Bradney	15 C. B. (N.S.) 536	227
Cumberland, In re. Worthington, Ex parte	3 Ch. D. 803	355, 356

D.

Daines *v.* Hartley	3 Ex. 200	531
Dalyell *v.* Tyrer	28 L. J. (Q.B.) 52	169
Daniel *v.* Coulsting	14 L. J. (C.P.) 70	69
Dann *v.* Spurrier	7 Ves. 231	201
Davidson *v.* Robertson	3 Dow. 218; at p. 229	114
Davis *v.* Garrett	6 Bing. 716	296, 299, 306
Day *v.* Day	Law Rep. 3 P. C. 751	373
De Mattos *v.* Saunders	Law Rep. 7 C. P. 570	38
Dennett *v.* Atherton	Law Rep. 7 Q. B. 316	147, 149
De Thoren *v.* Attorney-General	1 App. Cas. 686	411, 414
Deveron, The	1 Wm. Rob. 180	296
Dickenson *v.* Fletcher	Law Rep. 9 C. P. 1	364
Dixon *v.* Kershaw	2 Amb. 528	202, 204, 205
—— *v.* Metcalfe	2 Eden. 360	200
Dunlop *v.* Higgins	1 H. L. 381	348
Durant *v.* Carter	Law Rep. 9 C. P. 261	60, 61

E.

Eaglesfield *v.* Marquis of Londonderry	4 Ch. D. 693	377
Eastland *v.* Burchell	3 Q. B. D. 432	312
Edwards *v.* English	7 E. & B. 564	316
——— *v.* Scarsbrook	32 L. J. (N.S.) Q. B. 45	154
Eidsforth *v.* Farrer	4 C. B. 9; 16 L. J. (C.P.) 132	227
Ellis *v.* Mortimer	1 N. R. 257	324
Emly *v.* Lye	15 East. 7	117
Evans *v.* Hallam	Law Rep. 6 Q. B. 713	153, 156
Ewbank *v.* Nutting	7 C. B. 797	178, 180

F.

Farebrother *v.* Wodehouse	23 Beav. 18	268
Farnworth *v.* Bishop of Chester	4 B. & C. 555	201, 202, 204, 205, 206

		PAGE
Fernie *v.* Scott	Law Rep. 7 C. P. 209	104
Fisher *v.* Clement	10 B. & C. 472, p. 475	531
—— *v.* Lane	2 W. Bl. 834	501, 502
Flight *v.* Barton	3 My. & K. 282	145, 146, 149
Ford *v.* Hart	Law Rep. 9 C. P. 273	60, 61, 62, 64
—— *v.* Pye	Law Rep. 9 C. P. 269	60, 61
Franks *v.* Bollans	Law Rep. 3 Ch. 717	101, 103
Freeman *v.* Gainsford	18 C. B. (N.S.) 185	106
Furze *v.* Sharwood	2 Q. B. 388	119

G.

Gardner *v.* Ellis	Law Rep. 4 Ad. & E. 265	200
Gateward's Case	6 Rep. 59, b.	446, 454
Gill *v.* Manchester, &c., Railway Company	Law Rep. 8 Q. B. 186	166
Glover *v.* Coleman	Law Rep. 10 C. P. 108	392
Gover's Case	1 Ch. D. 182, p. 191	457, 458, 459, 465, 466, 468, 469, 473, 475
Gracie *v.* New York Insurance Company	8 Joh. N. Y. Rep. 237	428
Great Western Railway Company *v.* Blake	7 H. & N. 987	168
Griffin *v.* Dighton	5 B. & S. 93	392

H.

Hadley *v.* Baxendale	9 Ex. 341	283, 285, 288, 289
Harris' Case	Law Rep. 7 Ch. 587	348
—— *v.* Great Western Railway Company	1 Q. B. D. 515	3
—— *v.* Petherick	4 Q. B. D. 611	29, 31
—— *v.* Wall	1 Ex. 122	411
Hart *v.* Swaine	7 Ch. D. 42	377, 389
—— *v.* Windsor	12 M. & W. 68	511
Hartley *v.* Hudson	4 C. P. D. 367	487, 491
Harvey *v.* French	1 C. & M. 11	531
Hatton *v.* English	7 E. & B. 94; 26 L. J. (Q.B.) 161	57
Hayn *v.* Culliford	4 C. P. D. 182	158
Head *v.* Tattersall	Law Rep. 7 Ex. 7	325
Heddy *v.* Wheelhouse	Cro. Eliz. 591	442
Henderson *v.* Stevenson	Law Rep. 2 H. L. (Sc.) 470	1, 3, 4, 5, 6
Herbert *v.* Dean and Chapter of Westminster	1 P. Wms. 773	200, 204
Hermann *v.* Western Marine and Fire Insurance Company	13 Lo. R. 516	299
Hesketh *v.* Atherton Local Board	Law Rep. 9 Q. B.	274
Higginson *v.* Clowes	15 Ves. 521	377
Higgs v. Northern Assam Tea Company	Law Rep. 4 Ex. 387	38
Hill *v.* Perrsé	25 W. R. 275	140
Hills *v.* Shepherd	F. & F. 191	21
Hillstrom *v.* Gibson	22 L. T. (N.S.) 248	132, 134
Hindmarch, Ex parte	Law Rep. 3 Q. B. 12	184
Hitchins *v.* Brown	2 C. B. 25	68
Hobbs *v.* London and South Western Railway Company	Law Rep. 10 Q. B. 111	285
Hocking *v.* Acraman	12 M. & W. 170	153, 154, 155

		PAGE
Holford *v.* Bailey	13 Q. B. 426	439
Holroyd *v.* Marshall	10 H. L. C. 191	319, 320
Hope *v.* Meek	10 Ex. 829	152, 156
Howes *v.* Turner	1 C. P. D. 670	256, 262
Hull *v.* Wood, Doe *d.*	14 M. & W. 682	373
Hutton *v.* Cruttwell	1 E. & B. 15; 22 L. J. (Q.B.) 78	329
——— *v.* Warren	1 M. & W. 474	132
Hyde *v.* Warden	3 Ex. D. 72	145, 146

I.

Ipswich Case	B. & Aust. 261	547, 548
Irving *v.* Manning	6 C. B. 391	426

J.

Jane, The	2 Hagg. Adm. 338	296, 302
Jenkinson *v.* Pepys	6 Ves. 330	377
Jennings *v.* Rigby	33 Beav. 198	338
Jerningham, Ex parte. Jerningham, In re	9 Ch. D. 466	356, 357
Johnson *v.* Barnes	Law Rep. 7 C. P. 592, at p. 604	438, 452
Jones *v.* Edney	3 Camp. 285	377
Joselyne, Ex parte. Watt, In re	8 Ch. D. 327	338

K.

Kay *v.* Oxley	Law Rep. 10 Q. B. 360	377, 382
Kirchner *v.* Venus	12 Moo. P. C. 361	132

L.

Laing *v.* Reed	Law Rep. 5 Ch. App. 4	335, 336
Lang, Ex parte	5 Ch. D. 971	356, 357
Langley *v.* Hammond	Law Rep. 3 Ex. 161	377, 382, 383
Langton *v.* Horton	1 Hare, 549	268, 269
Law, Ex parte. Bayley, In re	3 Deac. 541	110
Lawrence *v.* Sydebotham	6 East, 45, at p. 52	296, 300, 302
Laythoarp *v.* Bryant	3 Scott, 238	329
Leatham *v.* Amor	47 L. J. (Q.B.) 581	319, 320, 321
Legge *v.* Croker	1 Ball & B. 506	387, 388, 389
Levy *v.* Lovell	14 Ch. D. 234	501
Lisbon Tramway Case	2 C. P. D. 469	472, 476
Lloyd *v.* Ashby	2 B. & Ad. 23	110
London and North Western Railway Company *v.* Wetherall	20 L. J. (Q.B.) 337	220
London and South Western Railway Company *v.* Flower	1 C. P. D. 77	511
London and Westminster Loan Co. *v.* Chase	12 C. B. (N.S.) 730; 31 L. J. (C.P.) 314	57, 58
Luckie *v.* Bushby	13 C. B. 864; 22 L. J. (C.B.) 220	36

M.

		PAGE
Mackay *v.* Commercial Bank of New Brunswick	Law Rep. 5 P. C. 394	334
———, Ex parte. Brown, Ex parte. Jeavons, In re	Law Rep. 8 Ch. 643	269
Makin *v.* Watkinson	Law Rep. 6 Ex. 25	508, 511
Magdalen Hospital Governors *v.* Knotts	8 Ch. D. 709; 4 App. Cas. 324	373
Maldon (Mayor of) *v.* Woolvet	12 Ad. & E. 13	438, 439, 449
Mannall *v.* Fisher	5 C. B. (N.S.) 856	439
Manson *v.* Thacker	1 Ch. D. 620, 624	388, 389
Marsh *v.* Lee	2 Vent. 337	268
Marshall *v.* Ulleswater Steam Navigation Company	3 B. & S. 732	435
——— *v.* York, Newcastle, and Berwick Railway Company	11 C. B. 655	169
Martin *v.* Great Indian Peninsular Railway Company	Law Rep. 3 Ex. 9	158
Mather *v.* Brown	1 C. P. D. 596	257, 258, 262, 264
Mathews, Ex parte. Angel, In re	Law Rep. 10 Ch. 304	355, 356
Mawson *v.* Blane	10 Ex. 206; 23 L. J. (Ex.) 342	411
Melling *v.* Leak	16 C. B. 652	105
Metcalfe *v.* Britannia Ironworks Company	1 Q. B. D. 613	132, 134
Mile End, Vestry of *v.* Whitechapel Union	1 Q. B. D. 680	250
Miller *v.* Miller	Law Rep. 13 Eq. 263	101
Moon *v.* Andrew	Law Rep. 4 C. P. 461	79, 83
Morris *v.* Edginton	3 Saund. 24	377
Moss *v.* Lichfield	7 M. & G. 72	227
—— *v.* Sweet	16 Q. B. 495	325
Mouse's Case	12 Rep. 63	296
Moysey *v.* Hillicoat	2 Hagg. Eccl. R. 30	201
Mulligan *v.* Cole	Law Rep. 10 Q. B. 549	519, 520, 522, 523, 529, 530, 533
Myatt *v.* Green	13 M. & W. 377	18
Myers *v.* Defries	4 Ex. D. 176	28, 30, 31
—— *v.* Perrigal	21 L. J. (Ch.) 434	101
—— *v.* Sarl	3 E. & E. 306	132

N.

Natches Insurance Company *v.* Stanton	2 Smed. & M. 340	299
National Mercantile Bank *v.* Hampson	5 Q. B. D. 177	359, 360
National Permanent Benefit Building Society, In re. Williamson, Ex parte	Law Rep. 5 Ch. App. 309	336
Nesbitt *v.* Greenwich Board of Works	Law Rep. 10 Q. B. 465	274
Nicolson *v.* Ricketts	2 E. & E. 497; 29 L. J. (Q.B.) 55.	119, 120, 125
Norden Steam Company *v.* Dempsey	1 C. P. D. 654	132, 134
North of England Insurance Association *v.* Armstrong	Law Rep. 5 Q. B. 244	426
Northcote *v.* Doughty	4 C. P. D. 385	411, 415, 416, 418
——— *v.* Pulsford	Law Rep. 10 C. P. 476	257
Northumberland (Duke of) *v.* Houghton	Law Rep. 5 Ex. 127	437, 442, 452
Noseworthy *v.* Buckland-in-the-Moor	Law Rep. 9 C. P. 233	258

O.

		PAGE
Odell, Ex parte. Walden, In re	10 Ch. D. 76	310
Ogden *v.* Benas	Law Rep. 9 C. P. 513	10, 15
Oliphant *v.* Mathews	16 Barbour, 608	121, 122
Onions *v.* Bowdler	5 C. B. 65	69, 72
Orbona, The	1 Spinks, 161	296, 297, 302
Oxford (Mayor of) *v.* Richardson	4 Tr. 439	438, 439

P.

Padwick *v.* Scott	2 Ch. D. 736	207
Palmer *v.* Stephens	1 Denio (New York), 471	110
Papayanni *v.* Hocquard	Law Rep. 1 P. C. 250	297, 302
Parker *v.* South Eastern Railway Company	2 C. P. D. 416	2, 3
—— *v.* Whyte	1 H. & M. 167	145
—— *v.* Winlow	7 E. & B. 942	132
Parmiter *v.* Coupland	6 M. & W. 105	531
Payne *v.* Burridge	12 M. & W. 727	490
Pearson *v.* Spencer	1 B. & S. 571	377, 383
Phillips *v.* South Western Railway Company	4 Q. B. D. 406	280
Pickard *v.* Sears	6 Ad. & E. 469	38
Plant *v.* James	5 B. & Ad. 791	377
Portland (Duke of) *v.* Bingham	1 Hagg. Consist. 157	201, 202, 204
Powell *v.* Edmunds	12 East, 6	377, 385
—— *v.* Guest	18 C. B. (N.S.) 72; 34 L. J. (C.P.) 69	60, 63
Propert *v.* Parker	3 My. & K. 280	146, 149

R.

Race *v.* Ward	4 E. & B. 713	449
Randal *v.* Cochran	1 Ves. Sen. 98	428
Rawley *v.* Rawley	1 Q. B. D. 465	411
Rawlins *v.* Briggs	3 C. P. D. 368	487
—— *v.* Webber	1 De G. F. & J. 304	377
—— *v.* Wickham	3 De G. & J. 304	377
Reg. *v.* Battle Union	Law Rep. 2 Q. B. 8	43, 44, 45, 46
—— *v.* Dixon	15 Q. B. 33	184
—— *v.* Lofthouse	Law Rep. 1 Q. B. 433	256
—— *v.* Swiss	Law Rep. 4 Q. B. 407	392
Reese River Silver Mining Company *v.* Smith	Law Rep. 4 H. L. 64	377
Reeve *v.* Whitmore	33 L. J. (Ch.) 63	319
Rex *v.* Archbishop of Canterbury and the Bishop of London	15 East, 117	202
—— *v.* Bishop of Chester	1 Tr. 396	199, 200, 206
—— *v.* Blooer	2 Burr. 1043	200, 202
—— *v.* Marquis of Stafford	3 Tr. 646	199, 201, 206
Rhodes *v.* Liverpool Commercial Investment Company	4 C. P. D. 425	312, 141
Richards *v.* James	Law Rep. 2 Q. B. 285	316
Riche *v.* Ashbury Railway Carriage and Iron Company	Law Rep. 7 H. L. 653	335

		PAGE
Ripley *v.* McClure	4 Ex. D. 345	350
Rivers (Lord) *v.* Adams	3 Ex. D. 361	436, 445, 446, 448, 450, 451, 454
Robinson *v.* Mollett	Law Rep. 7 H. L. C. 802	132
Rogers *v.* Allen	1 Camp. 309, at p. 317	438
Rowcliffe *v.* Leigh	6 Ch. D. 256	49
Rowley *v.* London and North Western Railway Company	Law Rep. 8 Ex. 221	285, 290
Routledge *v.* Grant	4 Bing. 653	347
Rugg *v.* Minett	11 East, 210	324
Rustonjee *v.* The Queen	1 Q. B. D. 487; 2 Q. B. D. 69	427

S.

Samuel *v.* Hitchmough	13 C. B. (N.S.) 3	227
Saner *v.* Bilton	7 Ch. D. 815	509, 510, 512, 513, 514
Savage *v.* Foster	9 Mod. 35	201
Schilizzi *v.* Derry	4 E. & B. 873	132
Schulte, Ex parte	Law Rep. 9 Ch. 409	154
Selby *v.* Pomfret	3 De G. F. & J. 595	268
Seymour *v.* Lord Courtney	5 Burr. 2814	438
Shawe *v.* Felton	2 East, 109	426
Siddons *v.* Lawrence	4 Ex. D. 177	28
Slim *v.* Croucher	1 De G. F. & J. 518	377
Smith *v.* Craven	1 C. & J. 500	110
——— *v.* Marrable	11 M. & W. 5	511
Somerset (Duke of) *v.* Fogwell	5 B. & C. 875	437
Soper *v.* Mayor of Basingstoke	2 C. P. D. 440	256, 258
Southwark Water Company *v.* Quick	3 Q. B. D. 315	107
Spalding *v.* Thompson	26 Beav. 637	268
Stafford Petition	20 L. T. 237	547
Staleybridge Petition	19 L. T. 703	547, 551
Stanhope Silkstone Collieries Company	11 Ch. D. 160	338
Stephens *v.* Reynolds	5 H. & N. 513	124
Stewart *v.* Tennessee Marine and Fire Insurance Company	1 Humph. 242	299
Stowe *v.* Jolliffe	Law Rep. 9 C. P. 734	184, 232, 233, 234, 235
Strata Mercella, Abbott of	9 Rep. 24	442
Sutton *v.* Bath	3 H. & N. 382	57
——— *v.* Gregory	Peake Add. Ca. 150	110
——— *v.* Temple	12 M. & W. 52	511
Swan *v.* Steele	1 East, 210	117
Swansea Shipping Company *v.* Duncan	12 Q. B. D. 644	208
Sweet *v.* Seager	2 C. B. (N.S.) 119	491
Swift *v.* Jewsbury	Law Rep. 9 Q. B. 301	377

T.

Tayloe *v.* Merchants' Fire Insurance Company	9 How. Sup. Ct. Rep. 390	347
Taylor *v.* Overseers of St. Mary Abbott	Law Rep. 6 C. P. 309	61, 65
Theobald *v.* Railway Passengers Assurance Company	10 Ex. 45	283
Thomas *v.* Rhymney Railway Company	Law Rep. 5 Q. B. 226	168
Thompson *v.* Lapworth	Law Rep. 3 C. P. 149	485, 486, 487, 490, 491, 492
Tidswell *v.* Whitworth	Law Rep. 2 C. P. 326	485, 487, 490, 491

		PAGE
Todhunter, Ex parte	Law Rep. 10 Eq. 425	154
Treleven *v.* Bray	1 Ch. D. 176	207
Tudball *v.* Town Clerk of Bristol	5 M. & G. 5	227
Turner and Skelton, In re	13 Ch. D. 130	389
——— *v.* Hardcastle	11 C. B. (N.S.) 683	153
——— *v.* Heyland	4 C. P. D. 432	28, 30, 31
Twycross *v.* Grant	2 C. P. D. 469	457, 458, 459, 460, 461, 465, 466, 468, 470, 473, 475

U.

Udal *v.* Walton	14 M. & W. 254	153, 154, 155, 156, 157
Udell *v.* Atherton	7 H. & N. 170	377
United States Bank *v.* Binney	5 Mason, 176, 184	121
Unthank, Ex parte	2 M. & P. 453	62

V.

Van *v.* Corpe	3 My. & K. 269	146, 149

W.

Walker *v.* Clay	42 L. T. 369	359
——— *v.* Hicks	3 Q. B. D. 8	18, 25
——— *v.* Shore	7 M. & G. 198	101
Wansey *v.* Perkins	7 M. & G. 127	76, 78, 79, 83, 84
Warrick *v.* Queen's College, Oxford	Law Rep. 10 Eq. 105	392, 438
Waterer, Ex parte. Taylor, Re	43 L. J. (Bkcy.) 25	356
Waterloo, The	2 Dodson, 433	296, 301
Watts *v.* Kelson	Law Rep. 6 Ch. 166	377, 382
——— *v.* Symes	1 De Gex, M. & G. 240	268
West Riding and Grimsby Railway Company *v.* Wakefield Board of Health	33 L. J. (M.C.) 174	220
Western Bank of Scotland *v.* Addie	Law Rep. 1 H. L., Sc. 145	335
Whalley *v.* Bramwell	15 Q. B. 775	184, 188, 190
Wheeldon *v.* Burrowes	12 Ch. D. 31	383
Whitchurch *v.* Fulham	Law Rep. 1 Q. B. 233	250
Whithorn *v.* Thomas	7 M. & G. 1	60, 61
Wrigglesworth *v.* Dallison	1 Doug. 201	132
Wilde *v.* Gibson	1 H. L. C. 626, 636	388
Williams *v.* Brown	1 Curt. 53	199, 205, 206
——— *v.* Williams	Law Rep. 15 Eq. 270	338
Wilson *v.* Breslauer	2 C. P. D. 314; 3 App. Cas. 672	355, 557
——— *v.* Finch-Hatton	2 Ex. D. 336	509, 511
——— *v.* Gabriel	4 B. & S. 243	38
——— *v.* Town Clerk of Salford	Law Rep. 4 C. P. 398	234
Winter *v.* Crowther	1 C. & J. 316, at p. 318	124
Woodward *v.* Winship	12 Pickering (Mass.) 430	110
Worthington *v.* Gimson	2 E. & E. 618	383

Y.

Young *v.* Turing	2 M. & G. at p. 601	426

CASES

DETERMINED BY THE

COMMON PLEAS DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE COMMON PLEAS DIVISION

XLIII VICTORIA.

BURKE *v.* THE SOUTH EASTERN RAILWAY COMPANY. 1879 *Nov.* 26.

Railway Company—Continental Ticket—Book of Coupons—Condition inside—Notice of.

Outside the cover of a paper book of coupons forming a railway ticket, issued to the plaintiff by the defendants, was printed the name of their railway, the words "Cheap return ticket, London to Paris and back, Second class," and a statement of the period and journey for which the ticket was available, but no reference to the inside of the cover. On the inside, and apparent on turning the leaf, was a condition limiting the responsibility of the defendants to their own trains.

The plaintiff having been injured while travelling by virtue of the ticket, in a French train, sued the defendants. They set up the condition. The plaintiff had not read and did not know of it.

The jury were directed that if it was brought to his notice it would afford a defence, and, on being asked the question, suggested in *Parker* v. *South Eastern Ry. Co.* (2 C. P. D. 416) whether what was done by the company was reasonably sufficient to bring the condition to the notice of the plaintiff, answered that it was not, and found a verdict in his favour. He moved for judgment.

Held, distinguishing *Henderson* v. *Stevenson* (L. R. 2 H. L. (Sc.) 470), that the whole book was the contract accepted by the plaintiff, and that he, therefore, could not reject the condition which was one of its terms, and that judgment should be entered for the defendants.

MOTION for judgment.

Action to recover damages for personal injury caused to the plaintiff through the negligence of the defendants.

1879

BURKE v. SOUTH EASTERN RAILWAY CO.

The trial took place before Cockburn, C.J., and a jury, when it appeared that the plaintiff had taken from the defendants an ordinary cheap return ticket consisting of a small paper book with eight leaves. On the cover, or outer leaf, which formed the first page, was printed the number of the ticket, and the words, "South Eastern Railway Cheap return ticket. London to Paris and back. Second class. Available by night-service only. This ticket is available for 14 days, including the day of issue and expiry. Example. A ticket issued on the 1st of the month will be available for the return journey up to and including the 14th. Available for the return journey by the South Eastern or London, Chatham, and Dover Railways." Inside the cover, that is to say, on the second page, statements were printed that "The cover without the coupons or the coupons without the cover, are of no value," and that "Each company incurs no responsibility of any kind beyond what arises in connection with its own trains and boats, in consequence of passengers being 'booked' to travel over the railways of other companies . . ." The inside leaves were coupons, each of which was to be given up at a different stage of the journey. The plaintiff while travelling under this ticket on a railway in France was injured through the negligence of the railway servants. He brought this action against the defendants, and gave evidence to the effect that, although he had often made the same journey with similar tickets, he had never read and did not know of the condition.

The defendants did not dispute the truth of his statement, but relied on the condition.

The learned judge directed the jury, that if it was brought to his notice it would be a defence, and adopting a form of question suggested by the Court of Appeal in *Parker* v. *South Eastern Ry. Co.* (1), asked the jury whether what was done by the company was reasonably sufficient to bring the condition to the notice of the plaintiff. The jury found that it was not, and gave their verdict for him with 250*l.* damages.

McIntyre, Q.C. (*Barnard*, with him), for the plaintiff. On the finding of the jury the plaintiff is entitled to judgment. *Hender-*

(1) 2 C. P. D. 416.

son v. *Stevenson* (1) is in point. There was in that case a contract on the face of a ticket, with no reference to a condition on the back, and the House of Lords held that the passenger who had not looked at the back was not bound by the condition. The judgment of Lord Cairns, C. (2), is conclusive in favour of the present plaintiff.

[LORD COLERIDGE, C.J. I thought that I followed *Henderson* v. *Stevenson* (1) in *Parker* v. *South Eastern Ry. Co.* (3), but that case was overruled by the Court of Appeal, where Bramwell, L.J., gave a judgment, based on reasoning which seems to me unanswerable, in favour of the defendants.]

The condition must be brought to the traveller's notice. The Lord Justice agrees that if the question whether the plaintiff ought to have read the condition is one of fact it should be left to the jury, but, no doubt, suggests that it is a question of law. In *Parker* v. *South Eastern Ry. Co.* (3) the words "See back" were on the face of the ticket. Here, however, there was nothing to call the attention of the plaintiff to the condition on the inside of the cover. He did not read it and "was certainly under no obligation to read the ticket, but was entitled to leave it unread if he pleased": see per Mellish, L.J., at p. 423. The contract was that he was to be carried to Paris and back and to deliver the coupons at the different stages of the journey.

[LINDLEY, J. *Harris* v. *Great Western Ry. Co.* (4) was a contemporaneous case, but decided contrary to *Parker's Case* (3)

LORD COLERIDGE, C.J. Both the Queen's Bench Division in the one case and the Court of Appeal in the other, while admitting the authority of *Henderson* v. *Stevenson* (1), distinguish it for various reasons.]

It governs the present case.

Sir H. Giffard, S.G. (*A. M. B. Bremner*, with him), for the defendants, was not heard.

LORD COLERIDGE, C.J., after stating the case and the terms of the ticket continued:—The defendants say that the injury com-

(1) Law Rep. 2 H. L. (Sc.) 470.
(2) Law Rep. 2 H. L. (Sc.) at p. 475.
(3) 1 C. P. D. 618; 2 C. P. D. 416, at p. 426.
(4) 1 Q. B. D. 515.

1879

BURKE v. SOUTH EASTERN RAILWAY CO.

plained of having happened in France, and beyond the limits of their own line, they are not responsible. Primâ facie that would be a complete answer to the action, but the Lord Chief Justice, who tried the case, having before him various decisions of this and other Courts on the subject of the responsibility of railway companies when they issue printed contracts, took the opinion of the jury on certain points, one of which was, whether there was reasonably sufficient notice of this term of the contract given by the defendants to the plaintiff, and the jury found in the negative. For the purposes of this decision the jury may be taken to have found that the plaintiff did not know of the condition. Certainly there was no affirmative evidence to shew that he had read or knew of this term. In my opinion it does not much matter which form of expression, viz., "term," or "condition," is used. I will take the finding of the jury most strongly against the defendants, and assume that the plaintiff was admitted not to have read and not to know of this condition, however improbable such a state of things was, and I will decide, as if I believed it, whether I do or do not. The question is, Does that, under the circumstances, afford any defence? In my opinion it affords none. The contract, as I understand it, can only be this little book, and the whole of this little book. This is the contract, and these are the terms on which the defendants agreed to take the plaintiff to Paris and back, and in an ordinary case that would be conceded. But it is supposed that on this peculiar subject of railway passengers the contrary has been decided by the decision of the highest tribunal. I should, of course, submit to follow the authority of the case of *Henderson* v. *Stevenson* (1), if it applied, whether I agreed with it or not, and should indeed have no power to do otherwise than to decide in accordance with it. It was attempted to assimilate this case to *Henderson* v. *Stevenson* (1), which shortly stated was this: There was a contract to take a passenger from Dublin to Whitehaven, and a condition printed on the other side. On the same side of the paper or card on which "Dublin to Whitehaven" was printed, there was no reference at all to what was printed on the other. It was admitted that if both sides were taken as the contract, the defendants were entitled to succeed, but it was said that

(1) Law Rep. 2 H. L. (Sc.) 470.

one side only was to be taken as the contract, because there was no reference to the other side, and that the jury must be taken to have found that the plaintiff had a right to assume, and did assume, that the one side contained the whole contract, and the terms on which he was agreeing with the defendants. That case was one of a bailment of luggage to the defendants for reward, and on the face of the paper there would arise an ordinary common law contract. The House of Lords held, in effect, that there was no evidence to shew that any other than the common law contract had been entered into by means of that piece of paper. The decision is based on the view which the House of Lords took of the facts. The House of Lords assumed that the whole contract was contained on the one side of the one piece of paper. Now, if the House of Lords would have come to the conclusion that the contract in such a case as this was really limited by the first side of the first leaf of these pages their decision in *Henderson* v. *Stevenson* (1) would be binding on us. But I think the facts here are entirely different, and I see the widest distinction between the facts of the one case and the other. Here is a small book with many pages, and it is admitted that the whole of the leaves are, during the continuance of the contract, to be made use of, and the passenger cannot turn over the first sheet and make use of the first coupon without having under his eyes the condition on which the defendants rely. It cannot be contended that the first sheet forms the whole contract because it was admitted that the coupons form part of the contract. Then if the first page and all the coupons form part of the contract, on what ground is page 2 to be rejected? The defendants might fairly say: "This is the contract, we contract on no other terms than these, the plaintiff has taken this contract. Fraud is not suggested, and by the ordinary application of eyesight he might have seen the condition." The mere fact of his not choosing to read, or even of his not having read the term, which was not concealed from him, is no ground whatever for rejecting that any more than any other part of the contract. So, bonâ fide accepting and not presuming to doubt the authority of *Henderson* v. *Stevenson* (1) in cases brought within it by their facts, I am of opinion that this case, at least, is

(1) Law Rep. 2 H. L. (Sc.) 470.

1879

BURKE v. SOUTH EASTERN RAILWAY CO.

not within it. We are asked to say that the condition is not part of the contract, because there is not written in large letters at the bottom of the first page, "Read the next page." This in effect is the contention of the plaintiff. There is neither principle nor authority for such a proposition, and I think that the defendants are entitled to judgment.

LINDLEY, J. I am of the same opinion. The question depends entirely on the answer to the inquiry, What was the contract, if any, into which the parties entered? The only contract entered into was thus formed: the plaintiff paid a sum of money for a journey to Paris and back, and he received this ticket. The jury have not found what the contract was, the question was not put to them in that shape, but they may be assumed to have found that the plaintiff did not know of the restrictive condition, and they have found that sufficient notice of it was not given to him. That leaves open the question what was the contract? Can the plaintiff make out a contract without that condition? I think it impossible for him to do so. If the jury had found that the contract was what was printed on the first page or on the coupons without the cover, the verdict would be so manifestly against the evidence that it could not stand. But they have not so found. I think that the answer to the question, What was the contract? is, "Here, in this small book, is the contract." The facts of *Henderson* v. *Stephenson* (1) were different. On the face of the card in that case was, "Dublin to Whitehaven," and nothing else, and on the back a condition. The House of Lords, as it were, split it in two, and said there was room to find that the contract was what appeared on the face of the card. But it would be impossible to split this contract up. It does not admit of it. Its physical form is altogether different. On these grounds I think that the plaintiff is not entitled to judgment and that the defendants are, because the plaintiff cannot sue on a contract and ignore one of the terms.

Judgment for the defendants.

Solicitor for plaintiff: *Parry.*
Solicitor for defendants: *Stevens.*

(1) Law Rep. 2 H. L. (Sc.) 470.

MATTHIESSEN AND ANOTHER *v.* THE LONDON AND COUNTY BANK. 1879 May 21.

Banker—Crossed Cheques Act, 1876 (39 & 40 *Vict. c.* 81), *s.* 12.

Sect. 12 of the Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81), exonerates a banker from all liability to the true owner of a cheque crossed in blank,—that is, with the words "and company" or an abbreviation thereof between two parallel transverse lines, or two parallel transverse lines simply, but without the words "not negotiable,"—where the banker has bonâ fide, in the usual course of business, and without negligence, received payment of it for a customer, notwithstanding any defect in the title of the latter, whether by reason of a forgery of the indorsement or otherwise.

STATEMENT of claim. 1. The plaintiffs are wine-merchants carrying on their business in London.

2. For some time before and in and about the month of July, 1877, and in and about the month of January, 1878, one J. W. Maddle was in the plaintiffs' employ as servant and traveller.

3. As such servant and traveller Maddle received from the plaintiffs' customers, by and with the plaintiffs' authority and for and on their behalf, payment for goods sold by the plaintiffs to such customers.

4. On or about the 20th of July, 1877, Oliver & Son, of Bury St. Edmunds, in payment for goods which had been sold to them by the plaintiffs, gave to Maddle a cheque dated the 20th of July, 1877, for 150*l.* 13*s.* 11*d.*, drawn by Oliver & Son upon Oakes, Bevan, & Co., bankers, Bury St. Edmunds, and payable on demand to Messrs. H. Matthiessen & Co., or order, which cheque Maddle received for and on behalf of the plaintiffs and with their authority.

5. On or about the 15th of January, 1878, J. Mott & Co., of Leicester, in payment of goods which had been sold to them by the plaintiffs, gave to Maddle a cheque dated January 15th, 1878, for 62*l.* 11*s.* 10*d.*, drawn by J. Mott & Co. upon T. & T. T. Paget, Leicester Bank, payable on demand to H. Matthiessen & Co. or order, crossed with the words "& Co.," which cheque Maddle received for and on behalf of the plaintiffs and with their authority.

6. On or about the 24th of January, 1878, C. Pratt & Sons, of Lincoln, in payment for goods which had been sold to them by

1879

MATTHIESSEN v. LONDON AND COUNTY BANK.

the plaintiffs, gave to Maddle a cheque dated January 24th, 1878, for 30*l.* 16*s.* 9*d.*, drawn by C. Pratt & Sons upon Smith, Ellison, & Co., Lincoln Bank, payable to H. Matthiessen & Co. or order, and crossed with the words "& Co.," which cheque Maddle received for and on behalf of the plaintiffs and with their authority.

7. The three cheques received by Maddle as stated in paragraphs 4, 5, 6 herein were never delivered to the plaintiffs, nor was any or either of them; but Maddle stole and embezzled the said three cheques from the plaintiffs.

8. Maddle, without the knowledge, sanction, or authority of the plaintiffs, forged the plaintiffs' name on the back of each of the said three cheques.

9. The plaintiffs' never indorsed nor authorized the indorsement of the said three cheques nor of either or any of them.

10. After Maddle had stolen and embezzled the said three cheques and forged the plaintiffs' indorsements thereon as stated in paragraphs 8 and 9 herein, the said three cheques, without the knowledge, sanction, or authority of the plaintiffs, were paid into the defendants' bank and were received by the defendants.

11. The defendants, having so received the three cheques presented the same for payment to the bankers upon whom the said cheques were respectively drawn, as mentioned in paragraphs 4, 5, and 6 herein, and received from each of the said bankers the amount for which each of the said cheques was respectively drawn, as mentioned in the said paragraphs, and retained and appropriated to their own use such amounts, being 150*l.* 13*s.* 11*d.*, 62*l.* 11*s.* 10*d.*, and 30*l.* 16*s.* 9*d.*, making together 246*l.* 2*s.* 6*d.*

12. The defendants by receiving and dealing with the said cheques, as stated in paragraphs 10 and 11, converted such cheques to their own use, and wrongfully deprived the plaintiffs of the possession of the said cheques.

13. The plaintiffs claim 244*l.* 2*s.* 6*d.* damages, being the value of the said three cheques.

14. The plaintiffs in the alternative will claim 244*l.* 2*s.* 6*d.*, for money payable by the defendants to the plaintiffs, for money had and received by the defendants for the use of the plaintiffs, under the circumstances stated in the preceding paragraphs of this statement of claim.

STATEMENT of defence. 1. That the defendants are bankers carrying on business in London and other places, and are in the habit of collecting cheques drawn upon country bankers for their customers the holders of such cheques; and that the three cheques in the statement of claim mentioned were all cheques, as mentioned in the statement of claim, drawn upon country bankers.

2. That, in the usual course of business, two of the said three cheques were handed to the defendants by one of their customers named James Fowler for collection, the said James Fowler being then the holder of the said cheques, and having an account at the defendants' bank; and the other of the said three cheques was handed to the defendants by one of their customers named William Wood for collection, the said William Wood being then the holder of the said cheques, and having an account at the defendants' bank.

3. The defendants in the usual course of business collected the said three cheques from the country bankers upon whom they were drawn, and in the usual course of business placed the amounts so collected to the credit of their customers the said James Fowler and William Wood.

4. The defendants did not know when they received the said three cheques from Fowler and Ward, nor when they collected the same as aforesaid, that the plaintiffs' names on the back of any of the said three cheques were forged.

5. By reason of the premises, the defendants say that they are not liable to the plaintiffs in the present action.

6. In further answer to the statement of claim, the defendants say that the cheques therein mentioned were cheques drawn after the passing of "The Crossed Cheques Act, 1876" (1), and were crossed cheques within the meaning of the said Act, and had not the words "not negotiable" on them or on either of them; and that they, when they received the said cheques crossed as aforesaid, were and still are bankers, and that they in good faith and without negligence, having received the said cheques as in paragraph 2 is set forth, received payment for their customers of the said cheques crossed as aforesaid, and in no other way dealt with the said cheques or any of them; that by reason of s. 12 of

(1) 39 & 40 Vict. c. 81.

1879

MATTHIESSEN v. LONDON AND COUNTY BANK.

the said statute they have incurred no liability to the plaintiffs; and that by reason of the said statute the plaintiffs are not entitled to maintain the present action against the defendants.

Demurrer, on the ground that the facts admitted in the statement of defence shew that the defendants are liable for the conversion of the cheques and for money had and received, and that s. 12 of the statute mentioned therein does not apply to a cheque payable to order, the indorsement to which is forged. Joinder.

Waddy, Q.C. (*Oppenheim*, with him), in support of the demurrer. Before the passing of 16 & 17 Vict. c. 59, the crossing of a cheque with the name of a particular banker did not restrict the negotiability of the instrument to such banker alone, but merely had the effect of compelling the holder to present it through *some* banker: *Bellamy* v. *Marjoribanks* (1); *Corland* v. *Ireland*. (2) The 19th section of that Act, which was passed for the protection of bankers, protects the banker upon whom the cheque is drawn, where it "purports to be indorsed by the person to whom the same shall be drawn payable:" but that protection was not extended to a banker who merely received the cheque from a customer for the purpose of collecting the money: *Ogden* v. *Benas* (3); *Arnold* v. *The Cheque Bank*. (4). The 12th section of 39 & 40 Vict. c. 81 (5) does not apply to a crossed cheque

(1) 7 Exch. 339.

(2) 4 W. R. 200.

(3) Law Rep. 9 C. P. 513.

(4) 1 C. P. D. 578.

(5) Sect. 4 enacts that, "Where a cheque bears across its face an addition of the words 'and company' or any abbreviation thereof between two parallel transverse lines, or of two parallel transverse lines simply, and either with or without the words 'not negotiable,' that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally:

"Where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable,' that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker."

Sect. 5. "Where a cheque is uncrossed, a lawful holder may cross it generally or specially:

"Where a cheque is crossed generally, a lawful holder may cross it specially:

"Where a cheque is crossed generally or specially, a lawful holder may add the words 'not negotiable:'

"Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker, his agent for collection."

Sect. 6. "A crossing authorized by

payable to order, the indorsement of which is forged, unless the words "not negotiable" are added to the crossing, whether the person receiving the money for it is a banker or not. If those words are added, the person taking the cheque, whether a banker

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this Act shall be deemed a material part of the cheque, and it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing."

Sect. 7. "Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker:

"Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed or to his agent for collection."

Sect. 8. "Where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof."

Sect. 9. "Where the banker on whom a crossed cheque is drawn has in good faith paid such cheque, if crossed generally, to a banker, and, if crossed specially, to the banker to whom it is crossed, or his agent for collection, being a banker, the banker paying the cheque and (in case such cheque has come to the hands of the payee) the drawer thereof shall respectively be entitled to the same rights and be placed in the same position in all respects as they would respectively have been entitled to and have been placed in if the amount of the cheque had been paid to and received by the true owner thereof."

Sect. 10. "Any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same shall be crossed, or his agent for collection, being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid."

Sect. 11. "Where a cheque is presented for payment which does not at the time of presentation appear to be crossed, or to have had a crossing which has been obliterated or to have been added to or altered otherwise than as authorized by this Act, a banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned, by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than is authorized by this Act, and of payment being made otherwise than to a banker or the banker to whom the cheque is or was crossed, or to his agent for collection, being a banker, as the case may be."

Sect. 12. "A person taking a cheque crossed generally or specially, bearing in either case the words 'not negotiable,' shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had:

"But a banker who has in good faith and without any negligence received payment for a customer of a cheque crossed generally or specially to himself, shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque, by reason only of having received such payment."

1879

MATTHIESSEN v. LONDON AND COUNTY BANK.

or any other person, takes it only subject to any defect of title in the person from whom he receives it. The two parts of that section are to be read together, the second branch of it, by reason of the use of the word "but," coming by way of proviso to the first branch; and so the section is to be read as if the words "not negotiable" applied to both parts alike.

A. L. Smith, contrà. The question is whether the 12th section of 39 & 40 Vict. c. 81 exonerates a banker from liability to the true owner of a cheque crossed in blank,—that is, with the words "and company" or an abbreviation thereof between two parallel transverse lines, or two parallel transverse lines simply, but without the words "not negotiable," where the banker has bonâ fide, and in the usual course of business, and without negligence, received payment of it for a customer, notwithstanding any defect in the title of the latter. It is submitted that it does. The Act was passed for the express purpose of relieving bankers from the hardship to which the previous legislation upon the subject of crossed cheques had left them exposed. The second branch of s. 12 in terms provides that in such a case as this the banker is relieved from responsibility.

GROVE, J. I am of opinion that this demurrer must be overruled. It appears to me that the whole question turns upon the language of the statute 39 & 40 Vict. c. 81, and mainly upon the words of s. 12 of that statute. The only assistance for construing that section is to be derived from what may be called the definition clauses of the Act. Now, the first part of s. 12 says, "a person taking a cheque crossed generally or specially." What is a cheque "crossed generally or specially?" That is explained by s. 4 to be, "where a cheque bears across its face an addition of the words 'and company,' or any abbreviation thereof, between two parallel transverse lines, or two parallel transverse lines simply, and either with or without the words 'not negotiable,' that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally. Where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable,' that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed

to that banker." There are certain other provisions, amongst others, in s. 5:—"Where a cheque is crossed generally, a lawful owner may cross it specially." Now s. 12 says: "A person taking a cheque crossed generally or specially, bearing in either case the words 'not negotiable,' shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had."

It cannot be argued that the words there, "bearing in either case the words 'not negotiable,'" are not most important. It is by the use of them that the non-negotiability of the cheque is effected; so that a person taking a cheque crossed with those words on it is not to have or be capable of giving a better title than that of the person from whom he had it. The next half of the 12th section,—omitting as I do for the present the word "but,"—states, "A banker who has in good faith, and without negligence, received payment for a customer of a cheque crossed generally, or specially to himself, shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment." Taking those two parts of the section as they appear on plain reading and grammatically, they each apply to a different state of things. The first part applies to a cheque which has a limit to its negotiability by the use of the words on it "not negotiable." The second part omits those words, and gives a protection to *bankers* with respect to cheques crossed generally or specially, and without saying any thing about the words "not negotiable." Had those two parts been different sections, and, instead of the word "but," had the figure 13 been there, marking the second branch of it as the 13th section, it does not seem to me possible that any one could have mistaken the meaning or application of the words in that last part. But then it is contended that, by the use of the word "but," the latter branch of the 12th section comes by way of a proviso to the first part; and that therefore it is to be read as if the words "not negotiable" were repeated in that latter part. That, to my mind, would be a strange stretch of language, and one which I would not assent to unless I saw some very imperative reason for it; such as, a manifest absurdity resulting from any other construction, which obliged one to import such

1879

MATTHIESSEN v. LONDON AND COUNTY BANK.

Grove, J.

words into the section; as, by so doing, one would be giving a forced meaning to the latter part of that section.

Now, do we require to give this forced meaning to the language by reason of the word "but" being employed? It seems to me that the word "but" can receive a very sufficient construction without giving such a forced meaning to the section. The first branch of the section refers to *any person*, the second branch refers to a *banker*. Therefore, the section, having in the first part given a protection to those who put upon their cheque the words "not negotiable," by which a person taking it shall not have or be capable of giving a better title to the cheque than that which the person had from whom he took it, goes on in the second part to give a banker a further protection, whether he is included in the word "person" or not; and a banker, if he has in good faith and without negligence received payment for a customer of a cheque crossed generally, or specially to himself, is not to incur any liability to the true owner of the cheque by reason only of having received such payment; the word "but" contradistinguishes "banker" from "any person." For what reason then, am I to construe the words there used against their obvious and plain meaning, and to import words providing for a different contingency, when, without repeating the words "not negotiable," the legislature might have made it clear that this was what is intended, by simply inserting the words "such a cheque," or "so crossed," in the second part of that section? Am I to suppose the legislature to have made a most singular blunder, and to have purposely expressed, and that too in very clear language, that which they did not mean? To give this part of the section the construction contended for by Mr. Waddy, I should be virtually making an enactment; for, I should be interpolating words in this second part of the section which do not occur, and which as it seems to me were intentionally omitted.

Is there, then, anything in the reason of the thing, viewing it with reference to the past law, which prevents my reading this enactment according to the plain and obvious meaning of the words themselves without either adding to or subtracting from them at all?

I do not wish to go through in detail the previous legislation.

It has been carefully gone through by Mr. Waddy, and comes substantially to this, that the legislature has aimed at making certain limitations to the negotiability of cheques; but the statutes have been so framed and carried into effect that, whatever may have been the intention of those who enacted them, they have done little, if anything, to restrict their negotiability. The case of *Bellamy* v. *Majoribanks* (1) threw open what was supposed to be a limitation upon crossed cheques; and the case of *Ogden* v. *Benas* (2) limited the protection to bankers given by 18 & 19 Vict. c. 59, s. 19, the effect of which, as construed by *Ogden* v. *Benas* (2), is, that the banker only upon whom the cheque is drawn which has a forged indorsement is protected against the consequence of his paying that cheque, and, as I understand it, upon the reason that, although a banker is bound to know the handwriting of his customer, he cannot know the handwriting of all the persons to whose order his customer may draw. It was supposed that that statute applied not merely to the banker upon whom the cheque is drawn, but to the collecting banker. But the case of *Ogden* v. *Benas* (2), followed by *Arnold* v. *Cheque Bank* (3), decided that it did not so apply. It is, therefore, not irrational to suppose that the legislature by the recent Act, 39 & 40 Vict c. 81, s. 12, wished to give to collecting bankers the protectection which it was supposed had been given by the previous statute; and there is nothing unreasonable in that section giving that protection; the more so as one object of the Act could hardly be attained without it: see s. 7. The words are perfectly plain; and I see nothing in the previous history or law of crossed cheques to make this construction of the section in any way doubtful or irrational. I am therefore of opinion that the demurrer must be overruled.

LINDLEY, J. I take the same view of the construction of the Act. The Act is confined entirely to crossed cheques; and the observations which I propose to make will also be confined to crossed cheques; for, I purposely say nothing about uncrossed cheques. The question is, what is the true construction of the Act 39 & 40

(1) 7 Ex. 389; 21 L. J. (Ex.) 70. (2) Law Rep. 9 C. P. 513.
(3) 1 C. P. D. 578.

1879

MATTHIESSEN v. LONDON AND COUNTY BANK.

Lindley, J.

Vict. c. 81. That Act has done more things than one. It has said that, when a cheque is crossed, it is to be paid through a banker, and through a banker only: and nobody can get the money except through a banker. That practically means this, that bankers must receive those cheques and collect them for their customers. Take the position of a collecting bank. A collecting bank receives from its customers crossed cheques: they must collect them or leave them alone: practically, of course, they do collect them. Then it comes to this,—what is the consequence if they do collect, and the customer who sends the cheque to them happens to have a bad title? It is, to my mind, a little hard in any case that a banker who merely collects the money for his customer should be liable for the money. I do not mean to say that, as the law stood before, the banker was not liable; but it is a little hard; and it appeared to me to be only reasonable, at all events, that the legislature should relieve bankers from some of the consequences against which no amount of foresight could possibly guard. When we look at this 12th section, it is obvious that that is what is meant. The first part of the section merely affects the title of persons taking cheques which are marked "not negotiable." This is a new-fashioned cheque altogether; and the Act of Parliament says that, if it is marked "not negotiable," the person who takes that cheque is to have no greater right than the person who gives it to him. The consequence of that is, that, in this particular case, the customers of the bank, Fowler and Wood, have no better title to the cheques than the person from whom they got them. That is the first part of the section. The second part of the section does not relate to cheques, but to the proceeds of cheques. The customer of the bank gets no better title than his transferror, not only when the cheque is marked "not negotiable," but when it is not so marked, if it is not an open, but a crossed cheque. The bank in either case deals with the proceeds. If the bank has the cheque, it may be stopped in their hands. The customer gets no better title than the person from whom he took it. But, when the bank has got the proceeds, and the true owner says to the bank, "Hand me those proceeds," the legislature in the second part of the 12th section says "No; if you, the bank, have collected only the proceeds of the cheque

1879

MATTHIESSEN v. LONDON AND COUNTY BANK.

Lindley, J.

for your customer, we will not render you responsible for the proceeds when you have dealt with the cheque in the only way in which, as a matter of business, you could deal with it. If you have done anything more; if you have applied it to your own use, that is another matter; but, if you have simply collected it through the clearing-house in the only way in which a banker collects cheques, and that is all you have done, the true owner shall look through you to your customer, and he and not you must be responsible to the true owner for the proceeds."

That appears to me to be the true meaning of the language: and, when you come to look at the actual words, there is not a single word in the section that militates against that construction in the slightest degree, unless it be the word "but." That word "but" is far too loose a word to control the clear meaning of the latter part of the 12th section; and, for the reasons already given, it appears to me that the bank is right, and that the demurrer ought to be overruled.

Demurrer overruled.

Solicitors for plaintiffs: *Wild, Barber, & Browne.*
Solicitors for defendants: *Stevens & Harries.*

GODDEN *v.* CORSTEN.

Nov. 28.

Practice—Claim—Credits—Particulars of—Order for.

A plaintiff may be ordered to give particulars of items which are, in his claim, placed to the credit of the defendant.

APPEAL from chambers.

Writ indorsed with a Claim upon an account for building some cottages according to contract.

In the account credit was given for two items thus set out:—"Less, allowed from the said contract for work not performed, 61*l.* 10*s.* 10*d.*" "Bricks, goods, and work, 180*l.* 2*s.* 11*d.*"

The defendant, wishing to plead a set-off or counter-claim, applied to a master for an order on the plaintiff to give particulars of the credits. The master refused, but on appeal Lopes, J., made the order.

1879

GODDEN v. CORSTEN.

Francis Turner, for the plaintiff. It is a rule not to compel the plaintiff to state the items of sums for which he has voluntarily given credit to the defendant: *Myatt* v. *Green*. (1) The Judicature Acts and Orders have not altered the former practice. This is not a case of a plaintiff seeking to sign judgment under Order XIV. There indorsement must, no doubt, be very specific: *Walker* v. *Hicks* (2), because, as Cockburn, C.J., said, "A party who is placed in the predicament of being liable to have judgment signed against him summarily, is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist." (3)

The defendant cannot want particulars of credits except to take advantage of some slip in stating them. The details are within his own knowledge.

English Harrison, for the defendant, was not heard.

LORD COLERIDGE, C.J. The old rule was made under a different system of pleading to that which now exists. The object of the new system is to give information on the pleadings, if an indorsement on writ, statement of claim, &c., may be so designated, and that everything stated by one litigant against the other should afford all the information to which he is fairly entitled for the purpose of stating his case. I think, therefore, that the Judicature Act, and the form of pleading sanctioned by it, have made the earlier decisions inapplicable, and without in the least degree questioning their perfect propriety at the time they were pronounced, I may say that they were given under a bygone system, and the principles which guided them no longer guide us. It is said in this case that the information sought by the defendant is apparently within his own knowledge, and that he does not want it. If it were so, and it were shewn that the defendant was only desiring to trouble the plaintiff, there would be good reason for saying that he should not be enabled to do it. But here that is manifestly not the case. Here the credit being general and the items various, as bricks, work, &c., and the total put at a lump sum, it is evident that the defendant not only may not know but apparently does not know which of the items these credits are

(1) 13 M. & W. 377. (2) 3 Q. B. D. 8. (3) 3 Q. B. D. at p. 9.

given for, still less does he know what particular sums the plaintiff has allocated to separate items, and, if the defendant wants to plead payment or set-off, it is essential to the conduct of his case that he should know what items the plaintiff has given him credit for, as otherwise he would claim things for which the plaintiff, having withheld information, would at the trial declare that he had already given credit, and thereby seriously embarrass the defendant. No hardship is imposed on the plaintiff by making him bring out the credits into pounds, shillings, and pence, for he must know, and can easily state, how the specific sum for which he gives credit is made up, and, obviously, if the information were withheld, hardship might probably be caused to the defendant. No substantial reason is given why this information should not be supplied. It is said that it has not hitherto been given, and the practice is not overruled. But if we are to make a precedent I have no hesitation in making one. The defendant's request is reasonable, and one to which we ought to give our sanction. Therefore I am of opinion that the order of Lopes, J., ought to be affirmed.

LINDLEY, J. I am of the same opinion. The defendant wants to plead a set-off or counter-claim, but does not want to do so in respect of matters for which the plaintiff has given credit. The plaintiff must know and ought to say for what sums he has given credit, as otherwise the defendant would be led into a pitfall.

Motion dismissed with costs.

Solicitor for plaintiff: *F. A. Cole.*
Solicitor for defendant: *J. Burton.*

1879
Nov. 28.

DAVIS *v.* GOODMAN AND ANOTHER.

Bill of Sale—Want of Attestation—Void as between Grantor and Grantee—41 & 42 Vict. c. 31, ss. 8, 10.

A bill of sale to which the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), applies, must be explained to the grantor and attested by a solicitor in compliance with the provisions of ss. 8, 10, or otherwise it will be void even as between the grantor and grantee.

CASE stated on appeal from the County Court of Worcestershire holden at Dudley.

The action was to recover damages from the defendants for taking and converting certain goods of the plaintiff. The acts complained of were committed under the powers of a bill of sale, dated the 13th of February, 1879, and made between the plaintiff of the one part, and the defendants of the other part. At the hearing of the action it was respectively admitted by the parties thereto, that if the bill of sale was valid as between the parties, the acts aforesaid were justified, and that the only question as to the validity of the bill of sale depended upon whether, under the Bills of Sale Act, 1878, a bill of sale made after the coming into operation of the Act is void, as between the parties thereto, for not being registered and attested as by the Act directed, it being admitted that the bill of sale had never been registered nor attested under the Act.

After argument, the judge of the county court held that the bill of sale in question having been made after the coming into operation of the Bills of Sale Act, 1878, and not having been attested as by the Act directed, was wholly void, and therefore that the defendants, the grantees thereof, were not protected by the provisions thereof in seizing and converting the plaintiff's goods; and the judge ordered judgment to be entered for the plaintiff subject to this case.

The question for the opinion of the Court was, Whether the bill of sale, as between the plaintiff and the defendants (the respective grantor and grantees thereunder), was void for want of due attestation under the Bills of Sale Act, 1878.

1879

DAVIS v. GOODMAN.

Plumptre, for the defendants. The bill of sale was valid. The former Bills of Sale Act (17 & 18 Vict. c. 36) did not make a bill of sale void as between grantor and grantee for want of the formalities prescribed by the Act: *Hills* v. *Shepherd* (1); *Barker* v. *Aston* (2); nor does the new Act, 41 & 42 Vict. c. 31, do so. The titles of both Acts are substantially the same. They are "for preventing frauds upon creditors by secret bills of sale of personal chattels." The scope of both Acts is the same, viz., to enforce the registration, and thereby the publication, of bills of sale. But the provisions of s. 1 in the old Act and of s. 8 in the new make unregistered bills of sale void against four classes of persons only, viz., assignees in bankruptcy, assignees under an assignment for creditors, sheriffs' officers, and execution creditors. Sect. 8 of 41 & 42 Vict. c. 31, enacts that "every bill of sale to which this Act applies shall be attested and shall be registered under this Act." No comma is placed after the word attested. The sole consequences of the bill of sale not being attested and registered are those which the section then proceeds to state, viz., that as against the four specified classes of persons it shall be deemed fraudulent and void. The grantees are not within any of those classes. Therefore it is not void as between the grantor and them. Sect. 10 merely prescribes in detail the formalities to be observed for a registered bill of sale. It would not be contended that a bill of sale would be void between the parties for want of registration, and attestation is a formality incidental to registration.

[LORD COLERIDGE, C.J.:—Is not the new requirement of attestation by a solicitor, who is to explain the bill of sale, inserted for the protection of the grantor? How would an explanation of it to the grantor benefit an execution creditor?]

Indirectly, perhaps, because if the stringent clauses often put into a bill of sale were explained to a grantor he might not sign it, and so his goods would be subject to the fi. fa. The new provision is merely directory, and is an additional precaution to be observed where the bill of sale is to be registered, and may, by publicity, affect the credit of the grantor. The legislature could not have meant by such an additional requirement to nullify or render

(1) F. & F. 191. (2) F. & F. 192.

1879

DAVIS v. GOODMAN

impossible private contracts by bill of sale as between the parties. So great a change in the law would have been more directly made.

Gore, for the plaintiff. The bill of sale was void. The Act is to consolidate and amend the law. One object of it is the protection of illiterate grantors, who are often induced to sign bills of sale containing clauses and powers of which they have no knowledge. Such cases of hardship were constantly before the courts. For the remedy of this evil s. 8 enacts in express terms that every bill of sale shall be attested, and s. 10 that it shall be attested by a solicitor, who is to previously explain its effect to the grantor. If the contention for the defendants were right, the new clause would never operate in favour of grantors.

Plumptre, replied.

LORD COLERIDGE, C.J. I am of opinion that the judgment of the county court judge was right, and should be affirmed. The question arises on the Bills of Sale Act, 1878, ss. 8, 10. Sect. 8 is, with the exception I will presently mention, identical, or substantially identical, with the corresponding clause in 17 & 18 Vict. c. 36, s. 1, which enacted that there should be registration with certain formalities, and that if those formalities were not complied with the bill of sale should be void against certain classes of persons. That section has been held not to make the bill of sale void as between the parties to it, and not only am I concluded by the authorities cited, but I think them perfectly right, for they interpreted the old Act to mean what it said, viz., that if the formalties were not observed the bill of sale was void as against certain persons. According to the rule of interpretation the expression of one thing is the exclusion of the other, and therefore the person not mentioned was not included, and as against him the bill of sale was not void. Now, the new Act contains in s. 8, for the first time, the words "shall be duly attested," and it is to be observed that, from the words of s. 8 alone, an argument of considerable weight arises in support of the construction put upon the Act by the county court judge, for those words are, not "shall be attested and registered," but "shall be duly attested and shall be registered," &c., or otherwise shall be

void. It appears to me that even to s. 8 alone a quite adequate construction might be given, if we were to hold that the alternative is confined to the latter part of the enactment, and that "duly attested" stands by itself, and is a mandatory part of the Act which must be complied with, and that the provision rendering the bill of sale void is limited to the case of failure in registration. So I should decide, as I am about to do, on s. 8 alone. But it does not stand alone, and the construction which, to my mind, would be almost without doubt but for the argument of the defendants, is confirmed by s. 10. Sect. 10 is mandatory in its terms, and says that "a bill of sale shall be attested and registered under the Act in the following manner: 1, the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor." That is a new provision, and manifestly has been introduced for the express purpose of guarding the grantor from frauds being committed on him. All the provisions as to registration are no doubt exceedingly important to the execution creditor, and I can quite understand that full effect may be given to them by saying that if they are not fulfilled the execution creditor shall not be defeated. But I am unable to see how the protection, which is manifestly intended to be given to the grantor by sub-s. 1 of s. 10, is to be afforded if the protection which that section is intended to give to the grantor is not given. The natural result follows that a provision necessary to the validity of the bill of sale has not been complied with; that the bill of sale is invalid, and invalid as between the parties, because the provision with which I am dealing is important to the parties and to no one else. It is not important to the execution creditor whether the bill of sale is explained and attested by a solicitor or not. It is extremely important to the grantor that the attesting solicitor shall explain to him what it is about. The Act provides that a solicitor shall explain the effect of the bill of sale, and that after explaining, he, the explaining solicitor, shall attest the bill of sale, and in the attestation state that he has explained it. I cannot give a reasonable construction to the Act without holding that unless that is done the bill of sale is void, and I hold that this bill of sale as

1879

DAVIS v. GOODMAN.

between grantor and grantee, being executed otherwise than as the Act provides, is invalid.

LINDLEY, J. I am of the same opinion; but I do not come to this conclusion without a great deal of hesitation. I think the Act of Parliament is obscure. But we must consider the object of this new provision as to attestation by a solicitor. The counsel for the defendants has argued that we should hold sub-s. 1 of s. 10 to be merely directory. That cannot be done unless some consequence of not following the directions could be pointed out. He however can only suggest that, if those directions are not pursued, the bill of sale will be void as between execution creditors or the other specified classes and the grantee. But the provision was obviously introduced for the advantage of the grantor. It does not positively declare that the bill of sale shall be explained, but that the attesting witness shall say it has been explained. I do not, however, think that the true construction of s. 10 is, that a mere statement of an explanation which had never in fact been given, would suffice. Such a construction would be absurd. The true construction must be that the attesting witness shall explain the bill of sale, for otherwise he would never be directed to say that he has explained it. Then why should it be explained to the grantor, except to preserve him from frauds upon him? No one accustomed to adjudicate upon interpleader claims can fail to see that. Effect cannot be given to the provision unless we hold the bill of sale to be void as between grantor and grantee, if it is not duly attested. So on the whole I come to the conclusion that, if the provisions as to registration are not satisfied, the bill of sale is void as against execution creditors and the other persons mentioned in the same category; and that if the provisions as to attestation are not complied with, the bill of sale is void even as between grantor and grantee.

Judgment affirmed; leave to appeal.

Solicitors for plaintiff: *Harper, Broad, & Badcock.*
Solicitors for defendants: *Milne, Riddell, & Mellor.*

[IN THE COURT OF APPEAL.]

1879
Nov. 11.

SMITH *v.* WILSON.

Practice—Writ of Summons, Special Indorsement on, under Order III., rule 6 *—Judgment signing, under Order XIV., rule* 1.

A special indorsement on a writ of summons claimed 49*l.*, and stated the particulars with dates and amounts to be "To goods;" it also contained an item for "Bank draft returned," which was entered both on the debit and credit side of the particulars, and it further contained a sum for "notary charges on same:"—

Held, a sufficient indorsement under Order III., rule 6, to entitle the plaintiff to sign judgment under Order XIV., rule 1.

APPEAL from the judgment of the Common Pleas Division in favour of the plaintiff. (1)

The special indorsement on a writ of summons was, "The plaintiff's claim is 49*l.* 5*s.* 8*d.* The following are the particulars. To goods, 16*s.* 1*d.*;" stating the various items of goods; it also contained two other items: "British Commercial Bank draft returned 20*l.*, and Notary Charges on same, 1*s.* 6*d.*" The particulars then gave credit for certain payments, including the bank draft for 20*l.*, and carried out the balance due, 49*l.* 5*s.* 8*d.*

A master made an order that the plaintiff should be at liberty to sign judgment under Order XIV., rule 1. Upon appeal, Field, J., affirmed the order, and the Common Pleas Division dismissed an appeal to rescind the order.

The defendant appealed.

Orr, for the defendant, contended that the particulars were insufficient to entitle the plaintiff to sign judgment under Order XIV., rule 1.

Walton, contrà, was not heard.

JESSEL, M.R. I must say that this is a frivolous appeal. Rule 6, of Order III. requires that the indorsement shall contain the particulars of the amount sought to be recovered. Its object is well stated by Cockburn, C.J. in *Walker* v. *Hicks* (2): "The

(1) 4 C. P. D. 392. (2) 3 Q. B. D. 8.

1879

SMITH v. WILSON.

defendant is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist," and Mellor, J., also in that case, says: "Before the plaintiff can ask for final judgment, the defendant ought to have afforded to him, by the indorsement of reasonably specific particulars of claim on the writ, an opportunity of seeing whether the claim is one to which he has any defence or not." This writ is indorsed, "To goods," and the amount is carried out. Everybody knows what it means, and the defendant also knows perfectly well it means "goods sold to you." Then there is an item, "Bank draft returned." This is entered on the debit side and on the credit side of the account; it is plain therefore, that it eliminates that item from both sides of the account. Then the particulars claim "Notary Charges on same." Does not that tell him what it is; and that the plaintiff claims 1*s.* 6*d.* in respect of noting the bill?

BRAMWELL and BRETT, L.JJ., concurred.

Judgment affirmed.

Solicitors for plaintiff: *Dunn & Palmer.*
Solicitor for defendant: *G. Johnson.*

Nov. 13.

JUPP AND ANOTHER *v.* COOPER.

Practice—Sheriff—Attachment for not returning a Writ of fi. fa.—Order XLIV, rule 2.

An attachment against the sheriff for not returning a writ of fi. fa. is not, as formerly, obtained as of course; but, since Order XLIV, rule 2, can only be applied for "on notice."

E. U. Bullen moved for an attachment against the sheriff of Surrey for not returning a writ of fi. fa. He moved upon the usual affidavit. He stated that, according to the old practice, the rule was absolute in the first instance: see Arch. Pr. 13th ed. 539; but that a doubt had been suggested whether that practice was consistent with Order XLIV., rule 2, which provides that "No writ of attachment shall be issued without the leave of

1879

JUPP v. COOPER.

the Court or a judge, to be applied for on notice to the party against whom the attachment is to be issued."

LINDLEY, J. The old practice is certainly not consistent with the new order. The application for an attachment must now be "on notice to the party against whom the attachment is to be issued."

Order nisi.

Solicitors for plaintiffs: *Stocken & Jupp.*

[IN THE COURT OF APPEAL.]

Dec. 18.

COLLINS *v.* WELCH.

Practice—Costs—Power of Judge at Nisi Prius, without Application, to disallow Plaintiff's Costs—Rules of the Supreme Court, Order LV., rule 1.

At the trial of an action of tort the jury found for the plaintiff and assessed the damages at 12*l.*: the counsel for the defendant was about to apply for a direction to deprive the plaintiff of the costs, but, before he did so, the judge made an order to that effect. The plaintiff's counsel was present and objected to the order being made:—

Held, that the order depriving the plaintiff of costs was lawfully made.

By Grove and Lopes, J.J. (in the Common Pleas Division), that the judge might under Rules of the Supreme Court, Order LV., make the order without any application being made to him.

By Bramwell, Brett, and Cotton, L.JJ. (in the Court of Appeal), that what occurred at the trial was equivalent to an application by the defendant and to shewing good cause why the order should be made.

5 C.P.D. 310
7 Q.B.D. 642, 643, 4

THE plaintiff claimed damages for personal injuries, and also for the loss of a diamond ring caused by the negligent driving of the defendant's servant.

At the trial before Denman, J., at the last summer assizes at Croydon, the negligence was proved, but it was suggested on the part of the defendant that the claim in respect of the diamond ring was not bonâ fide. The jury found a verdict for the plaintiff, damages 12*l.*

In answer to a question by the learned judge, the foreman of the jury said that the damages they had given included the value of the ring, which they were of opinion had really been lost; but

1879

COLLINS v. WELCH.

one of the jury observed that he thought the plaintiff should not have any costs, because the judge in the course of the case had suggested that it was one which ought to have been tried in a county court.

Denman, J., thereupon,—without any actual application by the counsel for the defendant, though he was instructed and was about to make such an application,—made an order to deprive the plaintiff of costs. The plaintiff's counsel was present, and objected to the order being made.

Nov. 4. *Dickens*, pursuant to notice, moved to rescind that order, on the ground that it was entirely voluntary on the part of the judge, without any application on the defendant's part, and without any cause shewn, and therefore not warranted by Order LV., rule 1. By that rule, "subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court." "Provided that, where any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shewn, the judge before whom such action or issue is tried, or the Court, shall otherwise order." This Court, in *Turner* v. *Heyland* (1), held that the judge's discretion as to costs might be exercised without any application having been made to him; and in *Myers* v. *Defries* (2) and *Siddons* v. *Lawrence* (3), the Court of Appeal held that the Divisional Court has under the above rule an original jurisdiction to deprive a successful party of the costs of an action tried before a jury. But the decision of this Court in *Turner* v. *Heyland* (1), that the judge at the trial can of his own mere motion deprive the plaintiff of costs, has been materially shaken by the judgments of Bramwell, L.J., and Thesiger, L.J., in *Myers* v. *Defries*. (2) The general effect of the rule is, to give to the judge or the Court the same wide discretion which the Court of Chancery had before with regard to costs.

[GROVE, J. The judgment of Bramwell, L.J., in the Court of Appeal does not touch the decision of this Court in *Turner* v. *Heyland*. (1) He was discussing, not whether a formal application

(1) 4 C. P. D. 432. (2) 4 Ex. D. 176.
(3) 4 Ex. D. 177.

at the trial was necessary to give the judge jurisdiction, but whether the Court had an original jurisdiction in cases where the judge at the trial had abstained from exercising it. I prefer to adhere to the golden rule of construction, that the words of a statute are to be read in their ordinary sense, unless the so construing them will lead to some incongruity or manifest absurdity.]

In *Harris* v. *Petherick* (1), where the Court of Appeal held that a judge has power to order a plaintiff who recovers a nominal sum to pay the defendant's costs, even when the action is tried before a jury, Bramwell, L.J., says: "It appears to me clear that, where the action has been tried without a jury, the circumstance that the plaintiff has recovered something will not of itself relieve him from liability to pay the defendant's costs. The proviso at the end of the order does not take away that power: the only difference is, that, if the action is tried before a jury, it is requisite that 'good cause' be shewn; but, when that has been done, the judge or Court has the same absolute discretion, as if the action had been tried without a jury." The judgment of Brett, L.J., is still stronger. "The first portion of Order LV.," he says, "is unlimited in its terms, and confers upon the judge an unlimited discretion. By the second portion, which relates to trials before a jury, it is directed that the costs shall follow the event, unless for good cause shewn the judge shall otherwise order. If that condition is complied with, the judge has ample discretion. Has there been 'good cause' shewn in the present instance?" That is a distinct authority to shew that there must be an application. None was made here.

[LOPES, J. Neither of the learned judges says what is an application, or what is "good cause."

GROVE, J. Can we reverse the judgment of this Court upon mere obiter dicta of the Court of Appeal?]

These dicta indicate the ground of the decision.

McCall, shewed cause. The learned judge at the trial made the order as to costs before the defendant's counsel (who had already urged before the jury that the action ought not to have been brought in the superior Court) had time to apply to him on

(1) 4 Q. B. D. 611.

1879

COLLINS v. WELCH.

the subject. The whole point is very clearly and succinctly stated in a few lines of the judgment of Lopes, J., in *Turner* v. *Heyland*. (1) "I cannot," he says, "think the Court of Appeal intended to say that, if the plaintiff recovered damages by some mere accident of litigation, and had misconducted himself, and the judge thought he ought not to have his costs, nevertheless the learned judge should be prevented from exercising his salutary powers under Order LV., rule 1, solely because no application was made to him. I do not think that such was the intention of the legislature, nor that Brett, L.J. (2) by his language ever intended that which has been contended for to-day."

[GROVE, J. The question is whether that decision is actually or virtually overruled by the decisions in the Court of Appeal.]

Dickens, in reply. The sole question is whether it is not a condition precedent to the exercise of the judge's discretion, to deprive the plaintiff of a right which the law has given him, that an application should be made to him for that purpose.

[GROVE, J. Do you contend that "good cause" must be shewn, as well as an application made?]

Such is the plain language of the rule.

GROVE, J. I am of opinion that this motion should be dismissed with costs. The only question we have to consider, is, whether the decision of this Court in *Turner* v. *Heyland* (1) has been overruled, absolutely and directly or by such inevitable implication, that we are bound by the judgments of the Court of Appeal in the cases to which we have been referred. I cannot see that it has. It may be that some of the expressions found in those judgments, especially in that of Thesiger, L.J., in *Myers* v. *Defries* (3), have a bearing opposed to our view. But the question before us was not the same as that before the Court of Appeal. The question there was, not whether an application by the defendant was a condition precedent to the making of an order by the judge, but what are the powers of the Court: here it is, what power has the judge sitting with a jury, under Order LV.? We cannot assume that the Court of Appeal meant to give a binding judg-

(1) 4 C. P. D. 432. (2) In *Baker* v. *Oakes*, 2 Q. B. D. 171.
(3) 4 Ex. D. 176.

ment upon that, which was not the actual point, upon which it was called on to decide. Opinions so expressed, though entitled to great respect, are nevertheless not binding. Looking at the whole scope and object of the order in question, I come to the conclusion that a substantive and specific application by counsel to the judge to deprive the plaintiff of costs, or to give costs to the defendant, is not a condition precedent to his right to exercise this jurisdiction, or that "good cause" must be shewn affirmatively. When the facts are such as to warrant the judge in acting upon the rule, he may fairly assume that counsel will make the application, he need not wait for it or suggest to him to make it. Or, it may be that the counsel is temporarily absent when the verdict is pronounced and therefore unable to apply. As at present advised, therefore, I think *Turner* v. *Heyland* (1) is not overruled, and that we ought to adhere to it until it is. It is to be hoped that our present decision will go up to the Court of Appeal, in order that the point may be definitively settled.

LOPES, J. I also think the order of my Brother Denman in this case was right and ought to be upheld. The point raised here is the same as that decided by this Court in *Turner* v. *Heyland*. (1) I was a party to that decision, and gave reasons for my judgment which I do not think it necessary to repeat here. It is said that that case is substantially overruled by the Court of Appeal in *Myers* v. *Defries* (2) and *Harris* v. *Petherick*. (3) It does not appear to me that it is by any means overruled. The point upon which those decisions turned was different from that which was before this Court in *Turner* v. *Heyland* (1), and before us now. I therefore think we are bound to adhere to our former decision.

Motion dismissed, with costs.

The plaintiff appealed.

Dec. 3. *Dickens*, for the plaintiff.

McCall, and *Foster*, for the defendant.

The arguments before the Court of Appeal were substantially the same as those before the Common Pleas Division. The Lords

(1) 4 C. P. D. 432. (2) 4 Ex. D. 176. (3) 4 Q. B. D. 611.

1879

COLLINS v. WELCH.

Justices reserved their decision, intimating that they would ask Denman, J., what had really occurred at the trial.

Cur. adv. vult.

Dec. 18. The following judgments were delivered:—

BRAMWELL, L.J. The question in this case turns upon the construction of Rules of the Supreme Court, Order LV. rule 1, and that is an order not easy to deal with. The proviso begins by saying, "where any action or issue is tried by a jury." Now an action is not tried by a jury, although they may try issues. An action is tried by the jury finding the facts and the judge deciding the law. The proviso then goes on "the costs shall follow the event." What is that "event?" does "event" mean "judgment" or "the event of the cause?" If the costs follow the judgment, what has the finding of the jury to do with them? Then the proviso goes on and says, "unless upon application made at the trial for good cause shewn" (which would lead to the inference that but for the word "good" being used a bad cause would be enough), "the judge before whom such action or issue is tried or the Court shall otherwise order." The inclination of my opinion is, that as the judge gave the direction as to costs at the trial, Grove and Lopes, JJ., were right in their decision. The only condition annexed to the power of depriving the successful party of costs is that the judge must exercise it at the trial. Suppose that a plaintiff sues upon a promissory note for 500*l.* which the jury find to be a forgery, and also for a debt of 50*l.* as to which the jury award 25*l.*, and suppose no counsel to be present when the jury deliver their finding: the plaintiff has substantially failed, and is the judge to say he cannot make an order as to costs without an application by the defendant? My Brother Denman has informed us that he had two cases before him. In one case the counsel rose with a view to make an application as to the costs, but in the other he anticipated the learned counsel by saying that the plaintiff must bear his own costs. That, I think, is substantially an application. The meaning of the rule is that the judge may give any direction as to costs, provided he exercises his power at the trial. The counsel in whose favour the order was made was ready to apply for it.

BRETT, L.J. I cannot criticise the order so severely as Bramwell, L.J., has done. The words "tried by a jury" mean "tried before a jury." "Event" must be "the event of the trial"—it means the finding and the judgment. The language of the rule may not be grammatical. It was intended by the proviso to put a limit to the power of the judge. If I understand aright the view of Grove and Lopes, JJ., the judge may of his own motion give a direction depriving the plaintiff of costs; but I think an application must be made to the judge at the trial, and cause must be shewn, and the word "good" was put into the rule in order to allow an appeal from his decision. With regard to the application required by Order LV. it is not necessary that the counsel should be the first to speak; but if he is present to support the application, and if counsel on the other side is present to oppose it, that is sufficient. "At the trial" means "substantially at the trial." If the finding of the jury is taken at the judge's lodgings and the trial is extended to the next morning in Court, that would be "at the trial," provided the counsel for the party against whom the order is made had an opportunity afforded to him of discussing it. Here there was in substance an application. All the steps were taken. Everything necessary was done at the trial, and the cause shewn was sufficient.

COTTON, L.J., concurred in the judgment of Bramwell, L.J.

Appeal dismissed.

Solicitor for plaintiff: *H. W. Christmas.*
Solicitor for defendant: *H. A. Lovett.*

1879
Dec. 18.

[IN THE COURT OF APPEAL.]

E. PELLAS & CO. *v.* THE NEPTUNE MARINE INSURANCE CO.

Insurance (Marine)—Action by Assignee of Policy—Set-off by Insurers of Claims against Assured—Policies of Marine Insurance Act, 1868 (31 & 32 *Vict.* c. 86), *s.* 1—*Rules of the Supreme Court*, 1875, *Order XIX., rule* 3—"*Set-off*"—"*Counter-claim.*"

6 Q B D 542
9 Q B D 656

In an action by the assignee of a policy of marine insurance, the insurers are not entitled to set-off a debt incurred with them by the assured for premiums on policies effected with them by the assured after the date of the assignment; for the claim under a policy for a loss is for unliquidated damages to which no set-off could be pleaded at law under the Statutes of Set-off in an action by the assured, nor in equity in a suit by the assignee, and therefore the debt incurred by the assured is not a "defence" open to the insurers under 31 & 32 Vict. c. 86, s. 1, that statute being intended merely to amend procedure and not to alter the rights of the parties to the policy; nor is the debt incurred by the assured the subject of "set-off" or "counter-claim" within the meaning of the Rules of the Supreme Court, Order XIX., rule 3.

APPEAL by the plaintiffs from a decision of the Common Pleas Division discharging a rule for a new trial on the ground of misdirection. (1)

The facts are set out in the report of the proceedings before the Common Pleas Division (1), and they may be shortly stated here as follows:—

On the 7th of April, 1876, Harris & Co. effected with the defendants a policy of insurance for the sum of 300*l.* on a cargo of coals (with cash advances thereon) shipped on board the ship *Toivatar*, for a voyage from the Tyne to Genoa. On the 22nd of May, 1876, the policy was assigned by Harris & Co. to Questa, of Genoa, and on the 30th of May, 1876, the policy was further assigned by Questa to Pastorino & Co., of Genoa, and on the 19th of May, 1877, the policy was assigned by Pastorino & Co. to the plaintiffs for the purpose of suing on it. The *Toivatar* during her voyage met with disasters, and did not reach her port of discharge until March, 1877. A notice of abandonment was given on the 12th of May, 1877, and was ultimately accepted by the defendants. Between the 1st of January and the 1st of February,

(1) 4 C. P. D. 139.

1877, Harris & Co. became indebted to the defendants in the sum of 40*l.* for premiums on policies other than that sued on in this action. The defendants had no notice that the policy had been assigned by Harris & Co. until after the debt of 40*l.* had been contracted. Harris & Co. filed a petition for liquidation on the 15th of February, 1877. The writ of summons was issued on the 24th of August, 1877. The defendants claimed to deduct this sum of 40*l.* in an action by the plaintiffs to recover for a total loss. (1)

At the trial, Lord Coleridge, C.J., directed the jury to find for the defendants.

Nov. 20, 21. *Murphy, Q.C.*, and *R. E. Webster, Q.C.*, for the plaintiffs. The set-off, upon which the defendants rely, would, upon properly framed pleadings under the Supreme Court of Judicature Acts, 1873, 1875, be a good answer to a claim upon the policy, if Harris & Co. had not assigned it: the interest in it is, however, now vested in the plaintiffs, who are entitled to sue upon it in their own names by force of the Policies of Marine Assurance Act, 1868 (31 & 32 Vict. c. 86), s. 1. (2) The defendants contend that the debt owing to them from Harris may be set off against a portion of the money due upon the policy, and it must be admitted for the plaintiffs that if the words of the statute are read in their extreme literal sense they favour the construction put upon them by the defendants' counsel; in that event the contention of the plaintiffs would be wrong, and the decision of the Common Pleas Division would be right. It is submitted, however, that the words of the statute must be interpreted with reference to their subject-matter and with reference

(1) The facts, as they appeared in the Court of Appeal, were slightly different from those stated in the judgment of the Common Pleas Division, 4 C. P. D. 141.

(2) By the Policies of Marine Assurance Act, 1868 (31 & 32 Vict. c. 86), s. 1, "Whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight, has been assigned, so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make, if the said action had been brought in the name of the person by whom or for whose account the policy sued on was effected."

1879

PELLAS v. NEPTUNE MARINE INSURANCE COMPANY.

to the mischief which the legislature intended to obviate; if the defendants' counsel are right, an insurance-broker may still incur a debt with the underwriters upon the security of the money due upon the policy, although he has indorsed it away for full value. It is not disputed for the plaintiffs that after an assignment by the assured all defences arising upon the policy itself are open to the underwriters, but the set-off relied on is not a defence of that description. It is to be recollected that the Policies of Marine Assurance Act, 1868, was passed some years before the Supreme Court of Judicature Acts, 1873–75, and that previously to these statutes there could be no set-off to a claim for unliquidated damages; a claim upon a policy of marine insurance is a claim for unliquidated damages even after the loss has been adjusted: *Luckie* v. *Bushby* (1); 1 Arnould on Marine Insurance, p. 219 (5th ed.)

[*A. L. Smith*, for the defendants, admitted that a claim under a policy of marine insurance was a claim for unliquidated damages.]

It follows that before the Supreme Court of Judicature Acts, 1873–75, there could have been no set-off in an action upon the policy, even if Harris & Co. had not assigned it and had themselves sued upon it in their own name and for their own benefit.

[PER CURIAM. It is very clear that to a claim upon the policy by Harris & Co. there could be no set-off under the Statutes of Set-off, 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 5.

COTTON, L.J. In a suit in the Court of Chancery brought by the assignee of a policy of marine insurance against the underwriters a set-off would not be allowed, if it would not be a good defence in an action at law brought by the assignor, the original assured.]

If there could be no set-off in an action by Harris & Co., there could be none in an action by the plaintiffs, who are assignees. The Policies of Marine Assurance Act, 1868, was not intended to alter the rights of the parties to a policy: it dealt only with procedure.

[*A. L. Smith*, for the defendants, stated that he should not

(1) 13 C. B. 864; 22 L. J. (C.P.) 220. 17 Jur 626

contend that the set-off claimed by the defendants would have afforded a good answer to an action by the plaintiffs before the Supreme Court of Judicature Acts, 1873, 1875.]

Those statutes do not assist the argument for the defendants: they are not material to the question raised in the present action, which is based upon the Policies of Marine Assurance Act, 1868. The plaintiffs cannot succeed as assignees of a debt or chose in action pursuant to the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 6, because the defendants have had no notice of the assignments: and this action cannot be regarded as a suit in equity by the assignees of a debt against the debtors, because the assignors are not parties to it (1); at least, the plaintiffs could not obtain judgment without joining Harris & Co. either as plaintiffs or as defendants. The provisions, therefore, of the Supreme Court of Judicature Acts, 1873, 1875, are inapplicable for the purposes of the present case; and under no circumstances can the defendants deduct the 40*l.* by way of counter-claim, under Rules of the Supreme Court, Order XIX., rule 3 (2): for by a counter-claim a defendant can set up demands against the plaintiff alone; but the claim of the defendants in the present action is against Harris & Co., and not against the plaintiffs. A counter-claim is in truth à cross-action between the parties to the suit in which it is pleaded. As this objection was not put forward on behalf of the plaintiffs at the trial, the defendants will be at liberty to amend their pleading in any way that they may think fit; but no amendment will enable them to raise a valid answer to the action.

(1) See 1 Dan. Chan. Prac. chap. 5, s. 1, p. 177 (5th ed.); and see *Brice* v. *Bannister*, 3 Q. B. D. 569, per Lord Coleridge, C.J., at p. 575.

(2) By the Rules of the Supreme Court, Order XIX., rule 3, "a defendant in an action may set off, or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

1879

PELLAS v. NEPTUNE MARINE INSURANCE COMPANY.

The assignee of a debt or chose in action is not affected by transactions between the assignor and the debtor after the assignment. Further the loss occurred after the defendants had trusted Harris & Co. for the premiums on other policies. *Wilson* v. *Gabriel* (1) is not really against the plaintiffs: it was a case upon demurrer, and was evidently decided upon the ground that where a credit is running one party cannot get rid of a set-off by assigning away the debt due to him. *De Mattos* v. *Saunders* (2) is not in point, but it shews that an assignee may be able to enforce his claim, although the debtor might be able to rely upon a set-off if he were sued by the assignor.

Moreover, it is contended for the plaintiffs that the doctrine laid down in *Pickard* v. *Sears* (3) applies to the facts before the Court, and that the defendants, having issued an instrument which the law allows to be assigned, must be taken to have contracted that no defence like that now relied upon shall be put forward. Upon this principle *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* (4); *In re Blakely Ordnance Co., Ex parte New Zealand Banking Corporation* (5); *Higgs* v. *Northern Assam Tea Co.* (6) were decided.

[COTTON, L.J. In those cases the intention of the parties to create an assignable interest appeared more or less clearly upon the face of the documents themselves.

BRETT, L.J. May not that argument be turned against the plaintiffs? Must they not be taken to have known that their immediate predecessors in title had been running a risk by not giving notice of the assignment to the defendants?]

It is not disputed that, as a general rule, the assignees of policies take them with all the equities attaching thereto, but this doctrine must be received with some limitation.

A. L. Smith, and *Chalmers*, for the defendants. Although formerly set-off could only take place between liquidated sums, yet that rule of law has been completely taken away by the Supreme Court of Judicature Acts, 1873, 1875. It may be correct that a counter-claim is merely a cross-action between the same parties:

(1) 4 B. & S. 243.
(2) Law Rep. 7 C. P. 570.
(3) 6 Ad. & E. 469.
(4) Law Rep. 2 Ch. 391.
(5) Law Rep. 3 Ch. 154.
(6) Law Rep. 4 Ex. 387.

it is nevertheless contended for the defendants that their claim against Harris & Co. is a set-off within the meaning of Rules of the Supreme Court, Order XIX., rule 3, which must be read together with the Policies of Marine Assurance Act, 1868.

[BRETT, L.J. That construction of the rule does not accurately distinguish between "set-off" and "counter-claim;" surely those words confer definite and independent remedies upon a defendant against the plaintiff.

COTTON, L.J. "Set-off" may in this rule perhaps mean not a mere defence to the action, but a cross-claim of such an amount as will entitle the defendant to judgment for some amount against the plaintiff.]

It is submitted that in that rule the term "set-off" allows a liquidated sum to be pleaded as an answer to an unliquidated claim.

Moreover, the defendants had no notice of the assignment by Harris & Co., and they cannot be deprived of their right of set-off because the debt due from them has been assigned: *Cavendish* v. *Geaves*. (1)

[BRAMWELL, L.J. We fully agree with the principles laid down in that case; but the facts before us seem to go beyond them.]

It would be a hardship upon the defendants if they were not allowed to set-off the 40*l.*; for if they had been aware of the assignment, they might not have given credit to Harris & Co.

Murphy, Q.C., did not reply.

Cur. adv. vult.

Dec. 18. BRAMWELL, L.J. We are of opinion that the appeal must be allowed. The plaintiffs are the assigness of a policy of marine insurance, and they have brought an action on it against the defendants, who have pleaded a set-off founded upon a debt due to them from the original assured. The question is whether this is any defence in point of law, and we are of opinion that it is not. The defendants rely upon the last clause of s. 1 of 31 & 32 Vict. c. 86, and their defence is based upon the words "and the defendant in any action shall be entitled to make any defence

(1) 24 Beav. 163. 3 Jur. N.S. 1086

1879

PELLAS v. NEPTUNE MARINE INSURANCE COMPANY.

which he would have been entitled to make, if the said action had been brought in the name of the person by whom or for whose account the policy was effected." This is a statute relating to procedure only; and I do not think that such words as I have read can make any difference as to the rights of the parties in an Act of Parliament relating to procedure. Without the aid of the statute the assignee might have sued at law in the name of the assured, and in a court of equity in his own name. The statute was passed because the legislature wished to give the assignee a more convenient remedy, and intended that he should be in the same position as if he sued in a court of equity; no alteration in the rights of the parties was contemplated, and in equity I have high authority for saying that such a set-off as this would be no defence. The assignee would be allowed to sue in a court of equity in his own name, because there was a technical objection to his suing in his own name in a court of law, but in equity the underwriter would not be permitted to set up any defence which he could not plead in a court of law. At the time this Act (31 & 32 Vict. c. 86) passed, this set-off would have been no defence either at law or in equity.

It has been argued that by Rules of the Supreme Court, 1875, Order XIX., rule 3, the set-off is admissible as a defence on the ground that that rule is to be read together with 31 & 32 Vict. c. 86, s. 1. The House of Lords (1) have decided that a general statute may repeal a particular statute: nevertheless I do not think that this rule alters 31 & 32 Vict. c. 86, which did not allow such an answer as this. The rule does not authorize a "defence" within the meaning of 31 & 32 Vict. c. 86. It is true that it speaks of "set-off" and "counter-claim," but these are different remedies from "set-off" under the statutes 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 5. Under those statutes set-off never gave the defendant a judgment for any amount: he never could recover anything from the plaintiff. The former plea of set-off merely alleged that the plaintiff's claim did not overtop the defence. But the argument for the defendants was that whatever was a "defence" to a liquidated claim, has been made by Order XIX.,

(1) It is presumed that Bramwell, L.J., was referring to *Garnett* v. *Bradley*, 3 App. Cas. 944.

rule 3, a defence to an unliquidated claim. I cannot assent to that argument; according to it, if A. sues B. for damages for breaking his leg, B. may set up as a "defence" a claim against A. as the acceptor of a bill of exchange; is it possible to say that that can be deemed a "defence?" The rule does not authorize such an answer as this, and I am confirmed in this opinion by its concluding words, which allow a Court or judge to refuse the defendant permission to avail himself of it. It is hardly to be supposed that this provision can refer to a defendant's right to defend himself. The orders and rules under the Supreme Court of Judicature Acts, 1873, 1875, are matters of procedure and are not intended to alter the law or the rights of the parties. If before those statutes the plaintiffs would have been entitled to maintain the action for the full amount from which the defendants seek to deduct 40*l.*, the plaintiffs can maintain it now.

BRETT and COTTON, L.JJ., concurred.

Appeal allowed.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Shum, Crossman, Crossman, & Pritchard, for Turnbull & Tilly, West Hartlepool.*

KENRICK *v.* THE OVERSEERS OF GUILSFIELD.

Nov. 27.

Poor Rate—Separate Rateability of a Right of Shooting, when severed from the Occupation of the Land—Rating Act, 1874 (37 & 38 *Vict. c.* 54), *s.* 6, *sub-s.* 2.

Under 37 & 38 Vict. c. 54, s. 6, sub-s. 2, where the owner of land lets the right of sporting over part of the land which he retains in his own occupation, the lessee may be rated in respect of the right of sporting.

CASE stated under 12 & 13 Vict. c. 45, s. 11.

1. By a deed dated the 2nd of April, 1877, Mrs. F. J. Curling, the owner of the Maesmawr estate, in the parish of Guilsfield, in the county of Montgomery, granted to the appellant the exclusive right of sporting over the estate, together with the use of the mansion-house and two cottages thereon and twenty-five acres of land, being part of the estate, for a term of five years from the 25th of March, 1877, at a total annual rental of 315*l.*

1879

KENRICK v. OVERSEERS OF GUILSFIELD.

2. The estate is described in the lease as containing about 1900 acres, but in fact it contains about 1750 acres only. Of this, 707 acres consist of woodlands, and are retained by Mrs. Curling in her own occupation.

3. The material part of the lease is as follows:—

The lessor doth hereby demise unto the lessee, his executors, &c., first, all that messuage or dwelling-house called and known as Maesmawr Hall, situate in the parish of Guilsfield, Montgomery, with the stables, &c.: also all those several pieces or parcels of pasture land being part of the demesne lands adjoining the last-mentioned premises, containing by estimation 25 acres or thereabouts; except and always reserved to the lessor, her heirs or assigns, or her or their tenants and work-people, full and free access and right of way at all times, with or without horses, cattle, carts, or carriages, through a gateway opening on to the Llanfair road across the land hereby demised, or a part thereof, to two grass-fields of the lessor now in hand: also the gardener's and keeper's cottage and dog-kennels situate adjacent to Maesmawr aforesaid: and also all fixtures and fittings now in or about the said dwelling-house and premises: And, secondly, the sole, entire, and exclusive right, privilege, and license of shooting, coursing, fowling, fishing, and sporting in, upon, through, and over those the lands, woods, plantations, coverts, rivers, streams, lakes, ponds, and stews of the lessor called and known as the Maesmawr estate; and also upon, through, and over such part of the Cloddin Farm of the lessor as lies beyond the old road leading from Welshpool to Maesmawr aforesaid, and adjoining to land of the Earl of Powis and the trustees of the late David Pugh, Esq.: all which said hereditaments and premises are situate in the parish of Guilsfield, Montgomery, containing together about 1900 acres (be the same more or less): and also (by way of demise and not of exception) full right and power for the lessee, his executors, administrators, and assigns, his and their friends, companions, and servants, with dogs and horses, from time to time and at all seasons of the term hereby granted to enter into and upon the said hereditaments and premises called the Maesmawr estate, or any part thereof, to fowl, course, sport, shoot, and fish thereon, and the game, wild-fowl, woodcocks, snipes, quails, land-rails, conies, and fish there taken and killed to have and carry away to the use of the lessee, his executors, &c.

4. The appellant was assessed in the valuation list for Guilsfield, Montgomery, in respect of the right of sporting as granted by the lease.

5. The overseers of Guilsfield on the 20th of November, 1878, made a poor-rate on the appellant, on the basis of the foregoing assessment. The appeal was from the assessment and rate.

The question for the opinion of the Court was, whether by the deed the right of sporting over the 1707 acres of woodlands retained in the occupation of the owner thereof, Mrs. Curling, is severed from the occupation of the land within the meaning of

the 6th section of 37 & 38 Vict. c. 54, so as to entitle the persons making the rate of 20th November, 1878, to rate the appellant in respect thereof.

Witt (*Gully, Q.C.*, with him), for the appellant. The value of the land in the occupation of Mrs. Curling is enhanced by the annual payment made to her for the right of shooting thereon, and she is solely rateable in respect thereof; the grantee of the shooting being a mere licensee, and therefore not rateable. Sect. 3 of the Rating Act, 1874 (37 & 38 Vict. c. 54), recites that "whereas by the Act of 43 Eliz. c. 2, it is provided that a poor rate shall be raised in every parish by taxation of, amongst other persons, every occupier of certain hereditaments in such parish, and it is expedient to extend the said Act and the Acts amending the same to hereditaments other than those mentioned in the said Act," and enacts that "from and after the commencement of this Act, the Poor Rate Acts shall extend to the following hereditaments in like manner as if they were mentioned in the recited Act of 43 Eliz. c. 2, that is to say" (sub-s. 2) "To rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land." Before the passing of that Act, there were three states of things to which the enactment might apply,—1. The case of land let with the right of sporting; in which case the tenant was rateable,—2. The case of land in the occupation of the owner, with the right of shooting in hand,—3. The case where the land was in hand, and the right of shooting only let to another; in which case the owner of the land was assessable to the poor-rate in respect of his occupation as enhanced in value by the pecuniary payment he received for the right to take the game: *Reg.* v. *Battle Union.* (1)

[LORD COLERIDGE, C.J. Sect. 6, sub-s. 2, enacts that, "where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof." Here the right of shooting is severed from the occupation of the land.]

The word "severed" in this Act is to be construed by the light

(1) Law Rep. 2 Q. B. 8.

1879

KENRICK v. OVERSEERS OF GUILSFIELD.

of the judicial decisions which took place anterior to its passing. If there be no severance in that sense, the section does not apply. Cockburn, C.J., in *Reg.* v. *Battle Union* says (1): "The right to take game upon land is an incident to the occupation of the land. If the land is let without any reservation or any previous granting away of that right, the right follows as a necessary consequence of the right of occupation. If we find that the occupier of the land derives a benefit, whether from taking game himself or from a pecuniary recompense made to him for allowing some one else to take it, it follows, inasmuch as the right to take the game is, ex concessis, merely an element of value, that, where the two things are thus united in one person, the value of the right to game must be taken as an element in arriving at the rateable value of the occupation. We have here a person who is the occupier, and who not only as owner but as occupier would be entitled to take the game, making over that right to some one else in consideration of a yearly rent. Therefore his occupation, as it appears to me, is productive to him of a value enhanced by the rent which he so receives."

[LORD COLERIDGE, C.J. The Lord Chief Justice is there dealing with a thing which was not at that time separately assessable. Now, when the right of sporting is held separately from the occupation of the land, the owner may be rated in respect of his occupation of the land as enhanced in value by the rent paid for the shooting, or the grantee of the shooting, at the option of the rating authorities.]

The real question is, whether this is a severance of the right of shooting from the occupation of the soil: if not, the section does not apply. Sub-s. 4 of s. 6 provides that, "for the purpose of that section, the person who, if the right of sporting is not let, is entitled to exercise the right, or who, if the right is let, is entitled to receive the rent for the same, shall be deemed to be the owner of the right."

M'Intyre, Q.C., for the respondents, was not called upon.

LORD COLERIDGE, C.J. I am of opinion that our judgment must be for the respondents. The question is whether under the

(1) Law Rep. 2 Q. B. 13.

37 & 38 Vict. c. 54, and under the circumstances of this case, the lessee or grantee of the right of sporting can at the option of the overseers be separately rated as the occupier thereof to the poor rate. Before the passing of that Act, according to the decision of the Court of Queen's Bench in *Reg.* v. *Battle Union* (1), the right of sporting was not the subject of a separate rating, not being a "hereditament" within 43 Eliz. c. 2, and thus persons who ought to be rated escaped rating, or the rate was imposed upon the wrong persons. Parliament has now by this Act enacted that this valuable right may, when severed from the occupation of the land, be the subject of a separate rating. When the occupation of the land and the right of taking the game were joined before, the occupier of the land was rated in respect of the value of his occupation as enhanced by the value of the sporting right; and so the right of taking game was indirectly rated. It was only where the occupation of the land and the right to take the game were severed that the law required amendment. The Act, therefore, made the right of sporting so severed rateable property. The 2nd sub-s. of s. 6 says that, "where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof." Primâ facie, the owner of the land is to be rated: but, if the right of sporting is severed from the occupation of the land, the person having that right may be rated in respect thereof. It is contended that the only person rateable here is the owner of the land. But, what are the facts? Mrs. Curling, the owner of a large estate, demises to the appellant a dwelling-house and about twenty-five acres of land, together with the "sole and exclusive right of shooting," &c., over the whole of the rest of the land, containing about 1750 acres. It is said that that is not a case where the right of sporting is severed from the occupation of the land. But, apart from authority, I should have thought that was exactly the case to which the words of s. 6, sub-s. 2, of the Act were intended to apply. Reliance has been placed on the part of the appellant upon the case of *Reg.* v. *Battle Union.* (1) But, when the facts of that case are looked at, and the law as it existed at that time, the

(1) Law Rep. 2 Q. B. at p. 8.

1879

KENRICK v. OVERSEERS OF GUILSFIELD.

case will be found to have no application whatever. There, the owner of the land was keeping it in its own occupation, letting the right of shooting at an annual rent; the Court of Queen's Bench very properly held that, inasmuch as the occupation of the land acquired an enhanced value from the letting of the sporting right, the owner was rateable in respect of such enhanced value. Here we are dealing with an Act of Parliament which for the first time makes the right of sporting the subject of rating. The words of the Act accurately describe what has been done here. The right of sporting belonged to Mrs. Curling: she has severed that right from her occupation of the land, and has let it to another. The Act says that the overseers may at their option rate either the owner of the right of sporting or the lessee thereof.

LINDLEY, J. I am of the same opinion. The question is whether the rate was properly made on the lessee of the right of sporting under 37 & 38 Vict. c. 54. Sub-s. 2 of s. 6 expressly gives the overseers the option of rating the owner of the land or the lessee of the right of sporting, where such right of sporting is severed from the occupation of the land. The question turns upon the words "when severed." The right of sporting over the whole estate is by indenture granted to the appellant for a term of five years. Apart from authority, I should say that was clearly a severance of the sporting right from the occupation of the land. It is said that it has never been so treated before. The authority cited, *Reg.* v. *Battle Union* (1), however, does not bear that out. Mrs. Curling might have been rated for the whole occupation of the land enhanced in value by the profit derived from the payment in respect of the sporting right; but they might equally rate the lessee of the right of sporting. The judgment of the Court in *Reg.* v. *Battle Union* (1) is obviously no authority for saying that, where the owner demises the right of shooting, such right is not severed from the occupation of the land.

Judgment for the respondents.

Solicitor for appellant: *J. Arthur Talbot, for Talbot & Woosnam, Newtown, Montgomeryshire.*

Solicitors for respondents: *Jones, Blaxland, & Son.*

(1) Law Rep. 2 Q. B. 8.

SHEWARD AND ANOTHER *v.* LORD LONSDALE. 1879 *Nov.* 13.

Practice—Interrogatories—Relevancy and Materiality—Order XXXI., rules 8, 19.

The plaintiffs claimed 1732*l.* 10s., the price of three horses alleged to have been sold by them to the defendant. By his statement of defence the defendant denied that the horses were sold to him, and further alleged that the prices charged were excessive, and that the horses were ordered by his wife without any authority to pledge his credit for them. Reply, that the horses were necessaries suitable to the estate and degree of the wife.

The following interrogatories were administered to the plaintiffs:—

1. State the date when you purchased each of the horses alleged by you to have been sold to the defendant on, &c.

2. State, if you did in fact purchase each or any of the said horses, and were in fact the owner of the same, when, as you allege, you sold them to the defendant.

3. Give the exact amount you paid or had contracted to pay for each of the said horses.

4. If you were not the owners of the said horses or any of them at the date when, as you allege, you sold them to the defendant, state specifically and in detail how and under what circumstances you had each and every of the said horses in your custody, possession, or control.

5. State specifically and in detail the date or dates upon which you received the said horses into your control.

Held, that the 1st and 3rd interrogatories were relevant and material to the issues, and ought to be answered; but that the 2nd, 4th, and 5th were inadmissible.

THE claim indorsed upon the writ of summons in this case was as follows:—"The plaintiffs' claim is 1732*l.* 10*s.* for horses sold to the defendant. The following are the particulars:—

"1878. Nov. 16.	To a bay gelding	630	0	0
	To a brown gelding . . .	577	10	0
	To a brown gelding . . .	525	0	0
		£1732	10	0"

Statement of defence.—1. Denying that the horses were sold to the defendant. 2. Alleging that the prices charged for the same by the plaintiffs were exorbitant and excessive. 3. That the horses were ordered by the wife of the defendant, who had no authority to pledge the defendant's credit for the same or any of

1879

SHEWARD v. LORD LONSDALE.

them, or to order the said horses on his behalf; and that immediately the defendant discovered that the horses had been ordered by his wife, he gave the plaintiffs notice of the premises, and at once offered to have the horses returned to the plaintiffs in the same state and condition as they were when delivered by the plaintiffs to the defendant's wife, but that the plaintiffs then refused to take back the horses, and thenceforward continuously have refused the same.

Reply.—Denying the material allegations in the 3rd paragraph of the defence, and, in the alternative, alleging that the horses were necessaries suitable to the then degree, estate, and condition of the defendant and his wife, and were necessary and suitable to the position which the defendant allowed his said wife to assume, and were necessary and suitable to the style in which the defendant was living.

Rejoinder, joining issue upon the 2nd and 3rd paragraphs of the reply.

Under a judge's order the following amongst other interrogatories were administered by the defendant to the plaintiffs:—

1. State the date when you purchased each of the horses alleged by you to have been sold to the defendant on the 16th of November, 1878.

2. State, if you did in fact purchase each or any of the said horses, and were in fact the owners of the same, when, as you allege, you sold them to the defendant.

3. Give the exact amount you paid or had contracted to pay for each of the said horses.

4. If you were not the owners of the said horses or any of them at the date when, as you allege, you sold the same to the defendant, state specifically and in detail how and under what circumstances you had each and every of the said horses in your custody, possession, or control.

5. State specifically and in detail the date or dates upon which you received the said horses into your control.

6. Did the defendant order the said horses or any of them? If yea, give the date or dates of such order or orders.

The plaintiff declined to answer the above interrogatories, "on the ground that they are immaterial to the issue in the action."

1879

SHEWARD v. LORD LONSDALE.

On the 5th of August, 1879, a master made an order that the plaintiff should within four days make and file a further and better answer to the interrogatories, the 6th being by consent struck out. This order was appealed from, and Lindley, J., on the 3rd of November, dismissed the appeal, with costs. Pursuant to notice,

C. Hall, moved that the order of Lindley, J., might be rescinded. The whole of the interrogatories are clearly irrelevant and immaterial, and a mere attempt to ferret out the plaintiffs' mode of conducting their business, and therefore ought to be disallowed, on the principle stated by the Master of the Rolls in *Rowcliffe* v. *Leigh*. (1) They are unnecessary; for, the plaintiffs may be cross-examined, and their books may be produced at the trial. It is not suggested that the plaintiffs are not the proper persons to sue for the price of the horses: and it is perfectly immaterial whether they were the plaintiffs' own property or whether they sold them on commission. Such interrogatories as these are an abuse of the practice; and the plaintiffs were justified in declining to answer them.

A. L. Smith, shewed cause. The periods at which the plaintiffs purchased or became possessed of the horses in question, and the prices they gave for them if they had purchased them, would certainly be very material to the issue as to the excessive prices charged for them. It may be that the plaintiffs gave 5*l.* the day before for the horse they sold to the defendant's wife for 630*l.* These are all questions which the plaintiffs would be bound to answer upon cross-examination.

[GROVE, J. You cannot interrogate as to every matter upon which the party may be cross-examined.]

Hall, was heard in reply.

GROVE, J. I am of opinion that the second, fourth, and fifth interrogatories should not be allowed: they are too remote from the matter in issue, and would lead to a wide field of inquiry: they would require the plaintiffs to state in detail the manner in which their business is conducted, which would be most unreasonable. As to the first and third interrogatories, I am not by any

(1) 6 Ch. D. 256, 262.

BIBL. LONDIN UNIV.

1879

SHEWARD v. LORD LONSDALE.

means sure that I should have allowed them: but, as my Brother Lindley, who is more familiar with these matters than I am, seems to think they should be allowed, I will not differ.

LINDLEY, J. I think, upon reflection, that I was a little hasty in allowing all these interrogatories. I have no doubt in my own mind that the first and third interrogatories are relevant and material. The others, however, tend to an inquiry which is manifestly too remote. I think the plaintiffs should be relieved from answering the second, fourth, and fifth interrogatories, and that the order should be limited to the first and third. The costs of the summonses and of this appeal will be costs in the cause.

Rule accordingly.

Solicitors for plaintiffs: *Allen & Son.*
Solicitors for defendant: *Ellis & Ellis.*

Nov. 27.

CORBET, APPELLANT; HAIGH, RESPONDENT.

Licensing Acts, 1872 (35 & 36 *Vict. c.* 94), *s.* 25, *and* 1874 (37 & 38 *Vict. c.* 49), *s.* 30—*Supplying intoxicating Liquor during prohibited Hours*—"*Private Friends.*"

P. gave a dinner to some friends at a licensed house kept by L. On the breaking up of P.'s party, L. invited nine of P.'s guests, including the appellant, to remain after the hour for closing, to partake of two bottles of claret at his (L.'s) expense. Upon an information charging these nine persons with being found on the premises during prohibited hours, the justices, though satisfied of the bona fides of the transaction, convicted them under s. 25 of the Licensing Act, 1872, on the ground that the landlord, on the arrival of the hour for closing, could not convert them into "private friends," for the purpose of their consuming the wine so supplied to them by him:—

Held, that the conviction was right.

CASE stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Kidderminster on the 30th of May, 1879, an information was preferred by George Haigh, chief superintendent of police for the borough, against M. Corbet and nine other persons, under s. 25 of the Licensing Act, 1872 (35 & 36 Vict. c. 94). The part of that section upon which the information was founded is as follows:—"If during any period during which any premises are required under the provisions of

this Act to be closed, any person is found on such premises, he shall, unless he satisfies the Court that he was an inmate, servant, or a lodger on such premises, or a bonâ fide traveller, or that otherwise his presence on such premises was not in contravention of the provisions of this Act with respect to the closing of licensed premises, be liable to a penalty not exceeding 40s."

The information stated that, on the 21st of May, 1879, at the borough of Kidderminster, Corbet and the eight others (naming them) were there and then found on the premises of one Henry Lund then licensed for the sale of intoxicating liquors by retail there situate, known by the sign of the Bay Horse, during part of the period during which the said premises were required under the provisions of the Licensing Act, 1874, to be closed.

The Licensing Act, 1874 (37 & 38 Vict. c. 49), by s. 3 fixes the hours of closing premises in which intoxicating liquors are sold by retail; and by s. 1 the Licensing Act, 1872, and the Licensing Act, 1874, are to be construed as one Act, so far as is consistent with the respective tenors of such Acts.

By s. 3 of the Licensing Act, 1874, the premises in question were required to be closed on the night of the 20th of May, 1879, from 11 o'clock until 6 on the following morning. But Lund, the keeper of the licensed premises, obtained an order of justices in petty sessions, under s. 29 of the Licensing Act, 1872, exempting him from the provisions with respect to the closing of premises between the hours of 11 and 12 on the night of the 20th of May, 1879, on the special occasion of a farewell dinner given by a Mr. Priestnall (who was leaving the town for Colchester) to a number of his friends, amongst whom were the several persons named as defendants in the information.

Upon the hearing of the information evidence was given that the appellant with the eight other persons named as defendants, and also Priestnall, were seen to leave the licensed premises shortly before 1 o'clock in the morning of the 21st of May, 1879.

Evidence was given on the part of the appellant, that Priestnall, on the night of the 20th of May, 1879, entertained a number of friends to dinner on his own invitation and at his own cost on the licensed premises. Such persons, including with others the appellant and the several others named as defendants in the

1879

CORBET v. HAIGH.

information, and Lund, the licensed person, were there as the exclusive guests of Priestnall until 12 o'clock on the night of the 20th of May, 1879.

It was also given in evidence on the part of the appellant that Lund, the licensed person, at or immediately before the hour of 12 invited the appellant with the other persons named in the information as defendants, and also Priestnall, to partake of two bottles of claret at his (Lund's) own cost, which they did, and that they remained on the licensed premises for the purpose of consuming the said wine until the time they were seen to leave; and that no other intoxicating liquor save and except the claret aforesaid was afterwards consumed. It was also given in evidence on the part of the appellant that the licensed premises were closed against the general public from the hour of 11 o'clock on the 20th of May, 1879, until the appellant with the others left them.

It was contended on the part of the appellant and the other defendants that they were not on the licensed premises in contravention of the provisions of the Act of Parliament, and that they were therefore not liable to conviction: and s. 30 of the Licensing Act, 1874, which provides that "no person keeping a house licensed under this or the principal Act shall be liable to any penalty for supplying intoxicating liquors after the hours of closing to private friends bonâ fide entertained by him at his own expense," was relied upon as supporting this view.

The justices,—although believing the evidence and in the bona fides of the appellant and his co-defendants,—convicted them each in a penalty of 1s. and costs, or, in default, to be imprisoned in the house of correction at Worcester for seven days; holding that it was not competent, under the circumstances, either for Lund, the keeper of the licensed premises, to give, or for the appellant and his co-defendants to accept, the two bottles of claret, and to remain on the licensed premises to consume them.

The question for the opinion of the Court was, Whether Lund, the keeper of the licensed premises, could, under the circumstances before stated, when the hour arrived for the closing of the licensed premises, on his own invitation convert the appellant and the other persons named as defendants (who had all previously to

that time been solely the guests of and entertained at the cost of Priestnall) into private friends, for the purpose of their consuming intoxicating liquor on the licensed premises at the expense of Lund.

E. Clarke, for the appellant. The words "required to be closed," in s. 25 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), mean closed in the sense of not being open for the sale of intoxicating liquors. The 30th section of the Act of 1874 provides that "no person keeping a house licensed under this or the principal Act (of 1872) shall be liable to any penalty for supplying intoxicating liquors after the hours of closing to private friends bonâ fide entertained by him at his own expense." That protects Lund from any penalty in respect of what is here complained of. If so, how can the friends who accept his hospitality be convicted under s. 25 of the Act of 1872?

[LORD COLERIDGE, C.J. If the dinner had been given at the expense of Lund, I should have had no doubt. The entertainment would have been still continuing.]

All the facts are found in favour of the appellant; for, the magistrates expressly say that they believed the evidence and bona fides of the appellant and his co-defendants. There is therefore a complete answer as to Lund himself. Can it be said, then, the transaction being admitted to be bonâ fide, that the appellant and the other defendants were in point of law disqualified from being the private friends of Lund, because down to the hour at which the premises lawfully remained open for the supply of liquors they were the guests of Priestnall? Lund not being liable under s. 30 of the Act of 1874, it would be inconsistent to hold the appellant and his co-defendants not to fall within the protection of s. 25 of the Act of 1872. In *Cooper* v. *Askew* (1), a private friend of a licensed person, bonâ fide entertained by him after the hour of closing, at his own expense, within s. 30 of the Act of 1874, was convicted under s. 25 of the Act of 1872; and the Court of Exchequer quashed the conviction; Cleasby, B., saying,—"The 25th section of the Licensing Act, 1872, which imposes a penalty upon any person found upon licensed premises during the

(1) 35 L. T. 347.

1879

CORBET v. HAIGH.

period the premises are required to be closed, must now be read with the 30th section of the Licensing Act, 1874, which exempts a licensed person who supplies intoxicating liquors after the hours of closing to private friends bonâ fide entertained by him at his own expense. That section of the later Act must also exempt such private friends so entertained; for, their presence on such premises is no longer, to use the limiting words of s. 25 of the first Act, in contravention of the provisions of the Licensing Acts with respect to the closing of the licensed premises."

No counsel appeared for the respondent.

LORD COLERIDGE, C.J. I am of opinion that the decision of the magistrates was right, and that this appeal must be dismissed. I do not mean to lay it down as law that it is impossible for a licensed victualler to have a private friend made at a moment, whom he might lawfully invite to take a glass of wine with him. But I hold that the magistrates came to a right conclusion upon the question which they have put to us. The question submitted to us is, whether Lund, the keeper of the licensed premises, could, "under the circumstances before stated," when the hour arrived for the closing of the licensed premises, on his own invitation convert the appellant and the other persons named as defendants (who had all previously to that time been solely the guests of and entertained at the cost of Priestnall) into private friends, for the purpose of their consuming intoxicating liquor on the licensed premises at the expense of Lund. Now, what are the circumstances? On the 20th of May, 1879, a farewell dinner was given at the Bay Horse at Kidderminster, of which Lund was the landlord, by one Priestnall to a number of his friends, among whom were the several persons named as defendants in the information. Lund had obtained an order of the justices in petty sessions to extend the time of closing on that evening from 11 till 12 o'clock. The appellant and the other persons named in the information remained on the premises as the exclusive guests of Priestnall and were entertained at his expense until 12 o'clock,—the house having been closed against the general public at 11 o'clock. Lund, the licensed person, at or immediately before 12 invited the appellant and the other persons named in the

information as defendants, and also Priestnall, to partake of two bottles of claret at his (Lund's) own cost, which they did, and they remained on the licensed premises for the purpose of consuming the wine until a few minutes before 1 o'clock,—no other intoxicating liquor save the claret was afterwards consumed. The magistrates thought, though they did not doubt that the transaction was perfectly bonâ fide, that the appellant and the others were guilty of a breach of the Act of Parliament. I think so too; and, without laying down any rule of law upon the subject, I must uphold their decision. These persons were found upon the licensed premises during a period during which the premises were required by the Licensing Act, 1872, to be closed, for a purpose not within the exemptions of s. 25. It has been urged by Mr. Clarke that the appellant and the other defendants could not be lawfully convicted of an offence within s. 25 of the Licensing Act, 1872, if the landlord himself was protected under s. 30 of the Licensing Act, 1874. But I am by no means satisfied that the landlord was protected by s. 30 of 37 & 38 Vict. c. 49. It would lead to numberless evasions of the Act if we were to hold that the circumstances disclosed in this case did not justify the conclusion at which the magistrates have arrived. I think the conviction must be affirmed.

LINDLEY, J. I am of the same opinion. The facts are shortly these:—One Lund kept a house at Kidderminster which he was licensed to keep open till 11 o'clock at night. On the day named in the information he obtained leave to keep open until 12 for the purpose of an entertainment given at his house by one Priestnall to some friends of the latter. At 12 o'clock some of the guests departed, when the appellant and the other persons named in the information remained at the invitation of the landlord, and as his private friends, to partake of two additional bottles of wine at his cost. The magistrates thought that Lund could not by calling these persons his private friends shelter them from the penalties they incurred by this infraction of the Licensing Acts: and I think they were quite right.

Conviction affirmed.

Solicitors for appellants: *Hunt & Son.*

1879
Nov. 21.

CASTLE *v.* DOWNTON.

Bill of Sale—Registration of—Affidavit—Description of Occupation of Grantor—Past Occupation—17 & 18 *Vict. c.* 36, *s.* 1.

The affidavit filed with a registered bill of sale stated that the grantor "was until lately" a commercial traveller. It appeared that the grantor was a commercial traveller at the date of the execution of the bill of sale:—

Held, that the description of his occupation was insufficient to satisfy the provisions of 17 & 18 Vict. c. 36, s. 1.

APPEAL from the county court of Middlesex at Bow.

The plaintiff in an interpleader issue claimed goods under a bill of sale executed by Abraham Downton the defendant, and registered according to 17 & 18 Vict. c. 36, s. 1, together with an affidavit of the attesting witness who, in his affidavit, after describing correctly the name and residence of the grantor, stated that he, the grantor, "was until lately a commercial town traveller or agent." On cross-examination the plaintiff admitted that when the bill of sale was executed the defendant was a commercial traveller, selling on commission.

The county court judge decided that the description in the affidavit of the occupation of the grantor was sufficient, and allowed the claim with costs.

A rule nisi having been obtained to set aside the judgment, or for a new trial, upon the ground that the affidavit contained no such description of the grantor as was required by the statute,

Melsheimer, shewed cause. The description was sufficient. "The test is not whether the description affords the fullest means of knowledge, but whether by the use of ordinary care the person mentioned in the description could be found out and identified:" per Brett, L.J., *Blount* v. *Harris*. (1) The claimant admitted that the grantor was a commercial traveller when the bill of sale was given, which is consistent with the statement in the affidavit that he "until lately" was so. The phrase was used for greater accuracy, as the witness may not have known at the moment of making the affidavit whether the grantor was then a commercial

(1) 4 Q. B. D. 603, at p. 605.

traveller. The onus of proving that he had any other occupation was on the person impeaching the bill of sale: *Sutton* v. *Bath.* (1)

[PER CURIAM. The headnote of that report seems to be unsupported by the judgment.]

Glen, in support of the rule. The description of the affidavit must fit the grantor at the time of giving the bill of sale and not at the time of filing the copy and affidavit: *London and Westminster Loan Co.* v. *Chase.* (2) If the affidavit states that the grantor "is" of a certain occupation the statement may be fairly taken to refer to the time of execution. The test of the sufficiency of the statement is whether perjury could be assigned on it: per Bovill, C.J., *Brodrick* v. *Scalé.* (3) But an affidavit containing no description of the grantor's occupation does not comply with the Act even although the occupation appears from the bill of sale: *Hatton* v. *English.* (4) Here no description whatever of the occupation of the grantor when he executed the security is given in the affidavit. Moreover, the description of his past occupation as "commercial town traveller or agent" is too vague. If a description of a former occupation might be given frauds which the Act guards against would be committed.

Melsheimer, in reply. *London and Westminster Loan Co.* v. *Chase* (2) was disapproved of in *Button* v. *O'Neil* (5), which decides that the affidavit must describe the residence of the grantor at the time of swearing the affidavit, and not of executing the bill of sale. That case applies equally to the description of his occupation.

LORD COLERIDGE, C.J. I come reluctantly to the conclusion that this bill of sale is invalid. I express no opinion as to any hardship which may arise from this decision, because I quite agree with the observations made by Williams, J., in *London and Westminster Loan Co.* v. *Chase* (6) on that subject. A bill of sale registered under this Act enables those who have property to pretend that they have not, and those who have not to pretend

(1) 3 H. & N. 382.
(2) 12 C. B. (N.S.) 730; 31 L. J. (C.P.) 314.
(3) Law Rep. 6 C. P. 98, at pp. 101, 102.
(4) 7 E. & B. 94; 26 L. J. (Q.B.) 161.
(5) 4 C. P. D. 354.
(6) 12 C. B. (N.S.) 730, at p. 739.

1879

CASTLE v. DOWNTON.

that they have. So the parties must comply with the terms of the Act, and, if they do not, must take the consequences. The description of the grantor is, that he lives at a certain place, and that he was "until lately" a commercial town traveller or agent. I do not now say whether commercial town traveller would do if the word were "is." But I decide the case on the words "was until lately." They seem to me extremely vague. "Until lately" may mean different things under different circumstances and in the mouths of different persons; a case might well arise in which this form of description would be adopted for the very purpose of misleading, and a man might be described as "until lately" of one occupation, whereas his actual occupation might be quite different.

To arrive at this conclusion it is not necessary to discuss the opinion of the Court in *London and Westminster Loan Co.* v. *Chase* (1) or *Button* v. *O'Neil* (2), because those cases differ only as to the point of time to which the description was to apply, the first case deciding that the time was to be the time of giving the bill of sale; the other case, the time of the affidavit filed, and at which the person making the affidavit was speaking. But that has no bearing on the present case, because this affidavit does not say that the grantor was at the time of granting the bill of sale, nor that he is now, a commercial traveller, but that he was "until lately," which may be at a time long before the bill of sale, and is quite consistent with his having since entered upon some occupation of a totally different kind. Not feeling that the question is concluded by any decided case, for I am not aware of any one exactly in point, I am of opinion that the bill of sale is invalid.

LINDLEY, J. I am of the same opinion. If we were to say that this description would suffice we should enable persons to take advantage of the form of words there adopted and to deliberately lead others to commit fraud. It so happens that evidence has been given to shew that the description here was misleading, for in point of fact the grantor was at the time of giving the bill of sale a commercial traveller. But the description in the affidavit is that he was "until lately," which might lead to the supposition

(1) 12 C. B. (N.S.) 730; 31 L. J. (C.P.) 314. (2) 4 C. P. D. 354.

that he was so no longer. Therefore I think the description will not do, and that the judgment must be reversed with costs.

1879

CASTLE v. DOWNTON.

Judgment reversed.

Solicitor for plaintiff: *Widdicomb.*
Solicitor for defendant: *E. A. Swan.*

FORD, APPELLANT *v.* DREW, RESPONDENT.

Nov. 18.

Parliament — County Vote — Freeholder — Residence — Absence during Service under Articles to a Solicitor — 2 & 3 Wm. 4, c. 45, s. 31.

By 2 & 3 Wm. 4, c. 45, s. 31, which makes provision for freeholders voting for a city being a county of itself, no freeholder shall be registered in any year "unless he shall have resided for six calendar months next previous" to a certain day in such year, within such city.

During part of the prescribed period of six months, a freeholder who had a bedroom kept for his exclusive use in his father's house within such a city was absent, serving under articles to a solicitor in London:—

Held, that, being bound by the articles, he could not be deemed to have had either the liberty or intention to return to the room whenever he liked, and therefore had not "resided" within the city for the required time within the meaning of the Act.

APPEAL from a decision of the revising barrister for the city and county of Exeter.

At a revision court the appellant duly objected to the name of the respondent being retained on the list of persons entitled to vote for the city of Exeter as the owner of a freehold rent-charge, upon the ground that the respondent had not resided for six calendar months previous to the 15th of July last within the said city, or within seven miles thereof.

He had previously lived at his father's house within seven miles of the city of Exeter, and a separate bedroom was set apart for his exclusive use in the house, and the same room continued to be set apart for his exclusive use, with the right to use it whenever he thought fit, and he always kept some of his clothes and other property in the room. In May, 1878, he went to London for the sole purpose of completing a term of service under articles to a solicitor there, and, subject thereto, he always intended to and

1879

FORD v. DREW.

did continue his said residence with the right to the said room in his father's house until the present time.

In August, 1878, the respondent returned to his father's house for three weeks' holiday. He then went back to London under the articles which expired on the 20th of January, 1879. On the 23rd of January he returned to his father's house, and resided therein until after the 15th of July, 1879. He had no other home.

The revising barrister decided that the respondent had a residence within seven miles of Exeter, and had a right to reside there during six calendar months previous to the 15th of July, 1879, and that his residence was sufficient to satisfy 2 & 3 Wm. 4, c. 45, s. 31 (1), and the barrister retained the respondent's name on the list of voters. If the Court should be of opinion that the decision was wrong, the name of the respondent was to be erased from the register.

Bompas, Q.C., for the appellant. The residence of the respondent during part of the six months was in London and not in Exeter: *Whithorn* v. *Thomas*. (2) The mere fact that he might have slept in the bedroom at his father's house was not enough. Of course if he had actually lived there, although occasionally absent during the period, that would have been sufficient: *Beal* v. *Fox*. (3) But he did not in fact do so. The voter must not only have a place of residence which he may use: *Durant* v. *Carter* (4); *Ford* v. *Pye* (5); but be able to go to it: *Powell* v. *Guest*. (6) There the claimant to vote had been imprisoned during part of the six months, and was therefore held not to have the necessary qualification. So in *Ford* v. *Hart* (7), where an officer away serving with his regiment had apartments reserved for him

(1) 2 & 3 Wm. 4, c. 45, s. 31, provides that in every city or town being a county of itself, freeholders shall be entitled to vote at the election of members of Parliament, but that no freeholder shall be registered in any year, "unless he shall have resided for six calendar months next previous to the last day of July in such year, within such city or town, or within seven statute miles thereof, or of any part thereof."

(2) 7 M. & G. 1.

(3) 3 C. P. D. 73.

(4) Law Rep. 9 C. P. 261.

(5) Law Rep. 9 C. P. 269.

(6) 18 C. B. (N.S.) 72; 34 L. J. (C.P.) 69.

(7) Law Rep. 9 C. P. 273.

in his mother's house, the Court held that, as he was subject to the will and pleasure of the Queen, and therefore not sui juris, there could not be such an intention of returning as to constitute a constructive residence in the apartments. In *Taylor* v. *Overseers of St. Mary Abbott* (1), the claimant, who was engaged to attend on a gentleman during the day, was not bound to sleep in the house, but could, if he pleased, go home to his lodgings, and therefore had a residence there.

Bucknill, for the respondent. The case finds as a fact that, subject to the articles, "the respondent always intended to, and did, continue his residence with the right to the said room in his father's house." The respondent was sui juris, and could return when he liked. Suppose his father had lived in the neighbourhood of London, and the son had every Saturday and Sunday slept in a bedroom kept for him at home, he surely would have had a residence there. Mere distance from London cannot make a difference. He might have travelled to Exeter after office hours on Saturday, and returned before the office opened again on Monday. In *Whithorn* v. *Thomas* (2), the residence was not bonâ fide, as Keating, J., pointed out in *Bond* v. *Overseers of St. George, Hanover Square.* (3) In *Durant* v. *Carter* (4), the clergyman having given up his house to a substitute, could not return to it at will. So in *Ford* v. *Pye.* (5) The officer in *Ford* v. *Hart* (6) was no longer sui juris, and had voluntarily incapacitated himself from returning to his mother's house at his own pleasure: see per Keating, J. The respondent had a dwelling at Exeter, and both liberty and the intention of returning to it. The requirements specified in *Bond* v. *Overseers of St. George, Hanover Square* (7), were therefore satisfied.

Bompas, Q.C., replied.

GROVE, J. I am not free from doubt, but I think that on the facts as stated and the balance of authorities, the respondent had not a residence within seven miles of the city of Exeter for the

(1) Law Rep. 6 C. P. 309.
(2) 7 M. & G. 1.
(3) Law Rep. 6 C. P. 312, at p. 313.
(4) Law Rep. 9 C. P. 261.
(5) Law Rep. 9 C. P. 269.
(6) Law Rep. 9 C. P. 273, at p. 275.
(7) Law Rep. 6 C. P. 312, at p. 314.

1879

FORD v. DREW.

necessary six months prior to the 15th of July, 1879. He was articled to a solicitor in London during a part of the time. I do not think the length of that part, be it more or less, makes any difference, because we must ascertain whether there was such a break of residence as invalidated his qualification. The so-called residence within the seven miles was at his father's house, where he had a bedroom, "with the right to use it up to the present time whenever he thought fit," as the case states. I cannot, however, read the case as if it alleged an absolute legal right, so that if the father had placed a guest in the room the son could have turned him out; it was a right only by permission of the father. This fact is not altogether unimportant, because the result is that the son's residence would depend on two permissions: first, the continuance by the father of the permission to reside at his house, and, secondly, the continuance by the solicitor of the permission to absent himself from the office. I have not seen the articles, but assume them to have been in the usual form of contract which "must be a valid subsisting contract during the time it extends to (see *Ex parte Unthank* (1)) and bind the clerk for the full prescribed term to serve the master, and that master only, and only in his profession or business of an attorney or solicitor": Pulling's Law relating to Attorneys, 3rd ed. p. 37.

As his father's house was in or near Exeter, it would have been practically impossible for the claimant to leave London while serving under the articles, except by going away on Saturday night and returning early on Monday morning, at great trouble and expense. That, indeed, he might do without the solicitor's leave. But he could not absent himself for a longer time. So that for five days, at least, of the week he had not the power of leaving without a breach of contract. Substantially, therefore, he was bound by his own agreement to serve the solicitor during office hours on the week days and not to absent himself. Could the simple possibility of his occasionally visiting his father at Exeter during the claimant's residence in London give him a "residence" in Exeter within the meaning of the Act? No case cited is exactly in point. *Ford* v. *Hart* (2), which, I observe, was argued on one side only, is the nearest, and is very similar to this,

(1) 2 M. & P. 453. (2) Law Rep. 9 C. P. 273.

except that service in the army is of a more compulsory nature than service with a solicitor, for an officer who deserts will be severely punished by military law. He cannot absent himself without the leave of his superior officer. What is the service of an articled clerk to a solicitor? The clerk is bound by contract to remain, and does in fact remain with the solicitor during the agreed period, occasionally absenting himself by permission of his principal, and, without it, only once a week. The suggestion made by Erle, C.J., in *Powell* v. *Guest* (1), that a man who is imprisoned for debt has not absolutely lost the liberty of returning to his place of residence, for by paying the debt he becomes free to return, was an obiter dictum. Much might be said for and against it. But even that is inapplicable to the present case, for there the debtor could, by paying the debt, release himself. There was a potentiality of returning. Here the articled clerk could not return without the consent of the solicitor. Indeed, although a person may have a residence in two places, the articled clerk cannot, I think, be said to have had his residence in a place which he could only occasionally visit, and where, even when he got there, his residence was only by consent of his father. I think that was not a residence within the plain intention and meaning of the statute. I am not free from doubt, but it arises more from expressions used in the cases upon the Act than on my own construction of it. In the cases it is difficult to draw the line between constructive and actual residence. But if I had been asked to disregard the decisions, and say whether the articled clerk resided in Exeter during the period in question, I should have said, without hesitation, No. The barrister might well have taken the contrary view, for the case is arguable, but I think that he was wrong.

LINDLEY, J. I am of the same opinion. At first sight and until we look at the authorities, it seems clear that the claimant did not reside at Exeter for the six months necessary, although he did so for nearly the six months. How nearly, of course, cannot be considered. Then on what theory is he to be intended to have done that which he did not actually do? How far is he to be treated

(1) 18 C. B. (N.S.) 72, at p. 81.

1879

FORD v. DREW.

as residing in Exeter when he was not actually residing there? In *Bond* v. *Overseers of St. George, Hanover Square* (1), Brett, J., cites a statement in Elliot on Registration, 2nd ed. p. 204, as having been fully adopted by Erle, C.J., viz. "that in order to constitute residence a party must possess at least a sleeping apartment, but that an uninterrupted abiding at such dwelling is not requisite, and that absence, no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence."

Let us see in what sense the present appellant was at liberty to return to Exeter. He had indeed physical liberty to return. But the distance between London and Exeter is such that, having regard to the obligation which he had entered into by his articles, he was not at liberty to return whenever he pleased. Consistently with his obligation he had not continued the residence at Exeter. Then had he the intention of returning? Are we to assume that he had an intention to break his contract? I apprehend that we are not. It would be contrary to every legal principle. He must be assumed to have intended to keep his contract, and so, I think, he must be assumed not to have had the intention to return. Therefore, in my opinion, he had neither the liberty nor intention to return. The absence of both those essentials seems to me to dispose of the case.

As to the authorities. In *Ford* v. *Hart* (2) the inability to return was by reason of the respondent being an officer in the army, who therefore could not reside at his mother's house without the leave of his commanding officer. Brett, J., said (3): "When the person in fact lives elsewhere, and cannot, by law, return to the borough without permission of another, it seems to me impossible to say that there is an intention to return within the meaning of the terms as applied to the doctrine of constructive residence." What does that mean? "By law" there means by military law, according to which the officer absenting himself without leave could be arrested and taken back to his regiment. The liberty

(1) Law Rep. 6 C. P. 312, at p. 314. (2) Law Rep. 9 C. P. 273.
(3) Law Rep. 9 C. P. at p. 276.

must be consistent with the duty. Counsel for the respondent argued that he might break his contract and return to Exeter. But the ratio decidendi in *Taylor* v. *Overseers of St. Mary Abbott* (1), was that the attendant had not agreed to reside in the house of the gentleman whom he served during the day, and, consistently with his engagement, he might have resided every night with his wife at their own lodgings. Bovill, C.J. (2), lays stress on that fact, saying that the appellant "had not bound himself to sleep elsewhere." Here, I think, the respondent had bound himself to reside in London, or so near to his place of business that he could attend to his duties. Having regard to the facts and authorities, I think that the revising barrister's decision was wrong, and should be reversed.

1879

FORD v. DREW.

Appeal allowed, without costs.

Solicitors for appellant: *Fox & Co.*
Solicitor for respondent: *S. D. Hamilton.*

PORRETT *v.* LORD.

Dec. 5.

Parliament—"Declaration as to Amending misdescription in List"—Change of Qualification—Powers of Amendment—41 & 42 *Vict. c.* 26, *ss.* 24, 28—*Sched., Form M.*

The appellant's qualification being described on a list of voters as a "house," "8, Birley Place," he made and sent in a "declaration for amending misdescription," under 41 & 42 Vict. c. 26, s. 24, schedule, form M, that the correct description was "houses in succession," "8, Birley Place and 9, Birley Place:"—

Held, that the revising barrister was right in expunging the appellant's name from the list, for there had been an alteration in the nature of the qualification, and to substitute "houses in succession" for "house" would be such a change in the description of the qualifying property as was not authorized by s. 28 of the Act.

APPEAL from the revising barrister for the townships of Burnley and Habergham Eaves in the parliamentary borough of Burnley.

At the revision of the list of persons entitled to be registered as parliamentary voters and to be enrolled as burgesses in

(1) Law Rep. 6 C. P. 309. (2) At p. 311.

1879

PORRETT v. LORD.

division 1, for the township of Burnley, within the parliamentary and municipal borough of Burnley, the respondent duly objected to the name of Arthur Speight Ludlow being retained on the list.

The grounds of objection were that his name, place of abode, nature of qualification, and the name and situation of his qualifying property were not correctly described.

He was described on the list thus:—

No.	Name of voter in full, surname being first.	Place of abode.	Nature of qualification.	Name and situation of qualifying property.
218	Ludlow, Arthur Speight	8, Birley Place	House	8, Birley Place

He had duly delivered to the town clerk for the borough of Burnley, on the 12th day of September, 1879, two declarations, such declarations being duly indorsed and initialed by him.

They were set out in the case. The first, headed "parliamentary," was a formal "declaration for correcting misdescription in the list."

The declarant stated that he was the person referred to in the list by the above-mentioned entry, which was copied out, and he then stated:—

My correct name and place of abode, and the correct particulars respecting my qualification are, and ought to be stated for the purposes of the register about to be made up of voters for the parliamentary borough of Burnley, as follows:—

Correct name.	Correct place of abode.	Correct nature of qualification.	Correct name and situation of qualifying property.
Ludlam, Arthur Speight	9, Birley Place	Houses in succession	8, Birley Place, and 9, Birley Place

The second declaration was for the correction of the list of burgesses for the municipal borough, but in other respects was identical with the first.

No evidence was given before the revising barrister other than

the said declarations that the premises in question had been occupied in immediate succession, nor did the voter appear by himself or by any person on his behalf.

The revising barrister was of opinion that, as the declaration proposed to substitute a new and different qualification in the place of that which was described in the list of voters, it was beyond the scope and meaning of sect. 24 of 41 & 42 Vict. c. 26, which was confined to misdescription and that he had no power to substitute such other and new qualification, and amend the said list of voters as required by the voter, who should have sent in a claim, which might have been the subject of objection in open court.

The revising barrister therefore held that the voter was not entitled to be retained on the list, and expunged his name therefrom.

If such decision was correct, such list of voters as revised was to remain without alteration, if such decision was incorrect the name and descriptions in the declarations were to be added to the list.

Nov. 18. *R. H. Collins*, for the appellant. The revising barrister had power under 41 & 42 Vict. c. 26 to amend the list according to the declaration. Before the Act correction was effected under 6 & 7 Vict. c. 18 by the persons omitted from the list, or desirous of being registered for a different qualification than that which appeared on it, sending in notices as prescribed in s. 15. Notices of objection were provided for in s. 17. But as the day fixed in those sections as that on or before which both notices by the claimant and notices of objection must be given was the same, viz. the 25th of August, an objector could, by withholding his notice until the last moment and then giving it, deprive the person objected to of his opportunity of claiming correction, whereas if the error on the list had been pointed out to him a few days earlier he might have obtained an amendment. The new Act, 41 & 42 Vict. c. 26, cures this defect. Under s. 24 declaration as to misdescription may be made on or before the 12th of September by "any person who is entered on any list . . . and whose name or place of abode, or the nature of whose

1879

PORRETT v. LORD.

qualification, or the name or situation of whose qualifying property is not correctly stated in such list, or in respect of whom there is any other error or omission in the said list." Mistakes in every column of the list are specifically provided for, and then follow general terms, "any other error or omission." Words could not be wider. The mistakes in the first three columns here could be amended even without the enlarged powers given by the new Act. "House" is sufficient description of the "nature of qualification," which in fact was the occupation of two houses in succession: *Hitchins* v. *Brown.* (1) Here "9, Birley Place," has been omitted from the fourth column. Surely that is an "omission" which may be rectified. The effect of s. 24 is not restricted by the limitations of the power of amendment which are in s. 28. There is much difference between s. 40 of the old Act and this s. 28 which takes effect instead of it. In s. 40 there was a proviso that no change should be made in the qualification except for the purpose of more clearly and accurately defining the same. That proviso is repeated in s. 28, sub-s. 13, with however the addition of the preliminary words, "except as herein provided," and larger powers of amendment are therein provided by s. 28, sub-s. 6. The legislature by apt words in 28 & 29 Vict. c. 36, which relates to county voters, restricted the use of declarations to amendment of the first and second column of the register, but has purposely enlarged the operation of such declarations under the new Act. By sub-s. 6 any particular may be inserted which ought to be in the list and any error or misdescription corrected.

Mellor, Q.C., for the respondent. The whole system of registration would be disturbed if declarations for amending misdescription could be used instead of new claims when there has been a change of qualification. By 6 & 7 Vict. c. 18, s. 15, every person being desirous of being registered for a different qualification than that for which his name appears on the list shall, before the 25th of August, give notice to the overseers and claim accordingly. Were the argument for the appellant to succeed that section would be practically repealed. Any one who omitted to give, in proper time, the notice prescribed would make a declaration of misdescription under 41 & 42 Vict. c. 26, s. 24. But s. 24 merely

(1) 2 C. B. 25.

directs that the declaration shall be received "as evidence of the facts declared to." The Act does not empower the barrister to make an amendment which changes the qualification. His powers of amending are confined to such a case as that of a "house" being misdescribed "shop." Words equally wide as those in the present Act were used in 6 & 7 Vict. c. 18, s. 40 enabling him to correct "any mistake," yet they gave him no power to change the qualification "house" into "houses occupied in succession:" *Bartlett* v. *Gibbs* (1); *Onions* v. *Bowdler*. (2) 6 & 7 Vict. c. 18, s. 40, provides that he shall not be "at liberty to change the description of the qualification as it appears on the list, except for the purpose of more clearly and accurately defining the same." That provision is repeated in sub-s. 13 of s. 28 in 41 & 42 Vict. c. 26, which operates precisely to the same extent and no more. In *Bendle* v. *Watson* (3) the Court held that the barrister could amend the description of a house, the number of which had been altered in the renumeration of the street. But the qualifying house was the same. Here another is added.

Collins replied. This is no attempt to substitute declarations for claims. Declarations are for persons on the list. Claims are to be made by persons who are off it. To alter the nature of the qualification from "house" to "shop" on the list would have been a change which could not have been effected under the earlier Acts. But 41 & 42 Vict. c. 26, schedule, Form M, evidently provides for such an amendment. In *Daniel* v. *Coulsting* (4) the argument to establish that a building once a dwelling, but then occupied partly as a warehouse, partly for a sale room, and partly for workshops, would have been unnecessary if the description could have been amended. The powers of amendment have been extended.

Cur. adv. vult.

GROVE, J. Supposing the statement made in the declaration for the correction of the list had been tendered as evidence before the revising barrister under the Registration Act, 1843 (6 & 7 Vict. c. 18) it would have been inadmissible, even assuming the

(1) 5 Man. & G. 81.
(2) 5 C. B. 65.
(3) Law Rep. 7 C. P. 163.
(4) 14 L. J. C. P. 70.

1879

PORRETT v. LORD.

facts proved. He would have been obliged to expunge the name, for s. 40, after prescribing the power of correcting mistakes, provides "that whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim as the case may be, nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same."

The recent Act of 1878, after several provisions which have, in argument before us, been said to give the revising barrister larger powers than the Registration Act, 1843, s. 40, repealed by it, enacts in s. 28, sub-s. 13, that "Except as herein provided, and whether any person is objected to or not, no evidence shall be given of any other qualification than that which is described in the list or claim as the case may be, nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." The terms are almost identical with and a repetition of those in s. 40 of the Registration Act, 1843. By the preceding sub-s. 12 of s. 28 [the learned judge read it], where the matter in relation to any alleged right to be on the list is insufficient in law to constitute a qualification of the nature or description stated or claimed, but sufficient in law to constitute a qualification of some other nature or description, the revising barrister may amend the list. Where the qualification on the list does constitute a real qualification, but by mistake is put down erroneously—the qualification itself not being changed—he may insert the proper terms of the qualification. The preceding sub-sections, which I need not go through, prevent the application of sub-s. 13 to the case before us. In this case there is a change of qualification, an obvious change, not a mistake in the terms of the qualification, as by "warehouse" or "shop" being written down instead of something else perfectly consistent with the qualification being the same. But here there is an evident omission of a house which makes up the qualifying property, for on the list is "8, Birley Place," and in the notice "9, Birley Place." So that is a qualification of a different nature. Instead of one house occupied for the qualifying term, there are

two houses in succession occupied for part of the time. It would appear that the voter had changed his residence from 8 to 9 Birley Place, and had occupied houses in succession. In *Bartlett* v. *Gibbs* (1) and other cases it was clearly decided that such a change could not be made the subject of amendment of the list under 6 & 7 Vict. c. 18, s. 40.

A fact was brought before us in argument which certainly impressed me, and I think also my Brother Lindley, viz., that in the Schedule, Form M, there is a specimen "Declaration for correcting misdescription in list," and the example is given of an entry in the list where the "nature of qualification as described in the list" is "shop," and the "correct nature of qualification" is "house." That, primâ facie, seems a different qualification, for a shop is, in one sense, a different qualification from a house. It may be that the "shop" and "house" in the example are supposed to be really the same place, and that "house" was described erroneously as a "shop," but, at the same time, when the name and situation of the "shop" are found to be described in the fourth column of the register as "2, Shire Lane" and the name and situation of the "house" in the corrected entry "24, Shire Lane," this looks very like a change of qualification. I should have no difficulty in the case but for those words in the schedule which raise a doubt not entirely removed from my mind. The form may be open to the explanation that it is a mere example of the correction of an error in each column. But it certainly seems inconsistent with sub-s. 13. There is, however, this distinction between the form and the present case, viz., that the example given is consistent with there having been no change in the supposititious qualification, whereas in the case before us there clearly has been such change. Here "8" is changed to "8 and 9," and "house" to "houses in succession." I think it would be an extremely forced supposition to assume this was not a change of qualification. Therefore I think that the barrister was right in expunging the name, and our judgment must be for the respondent with costs.

LINDLEY, J. The cases of *Bartlett* v. *Gibbs* (1) and *Onions* v.

(1) 5 Man. & G. 81.

1879

PORRETT v. LORD.

Bowdler (1) shew that the claim in this case could not have been amended before 1878 upon evidence being given to the effect of the declaration made in this case. The ratio decidendi in *Bartlett* v. *Gibbs* (2), which most resembles this, was, that the house mentioned in the claim did not give a qualification, because it had not been occupied long enough, and that the addition of another house was not a better identification of the property referred to in the claim as a qualification, but was the addition to that of something else necessary to confer a qualification. This reasoning appears to me to apply to the present case, and to distinguish it from those like *Bendle* v. *Watson* (3), where the number of the qualifying house was inserted or corrected by the revising barrister.

Sect. 24 of the Act of 1878 (41 & 42 Vict. c. 26) is, I think, a mere alteration in the mode of giving evidence, and Sched. M. only gives a form in which declarations under that section are to be made. Neither s. 24 nor the Form M. says what is to be done by the revising barrister when the evidence is given. To ascertain this, we must look to s. 28, sub-ss. 6 and 13, of which, though slightly different from 6 & 7 Vict. c. 18, s. 40, are framed on the same principle.

I therefore am of opinion that the revising barrister was right, and that the appeal ought to be dismissed.

Appeal dismissed, with costs.

Solicitors for appellant: *Shaw & Tremellen.*
Solicitor for respondent: *Warriner.*

(1) 5 C. B. 65. (2) 5 Man. & G. 81.
(3) Law Rep. 7 C. P. 163.

MORTLOCK *v.* FARRER.
HALL *v.* CROPPER.

1879
Nov. 19.

Parliament—Notice of Objection, Form of—Note—Specification of List—Franchise List—Parochial List—41 & 42 Vict. c. 26, Schedule, Form I.

Notices of objection given in the Forms of the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26) Schedule Form I., satisfy the requirements of the note to those Forms that they "should specify the list to which the objection refers," by specifying such list with regard to the various kinds of franchise, e.g. the list of freeholders, occupiers, or lodgers, and need not specify the particular parochial list to which the objection refers.

APPEAL from the revising barrister for the city of Westminster.

The appellant objected to the name of Thomas Allen, of 79, Berwick Street, being retained upon the list of persons who being on the register of voters in force for the parliamentary borough of Westminster, in respect of residence in lodgings within the parish of St. James', claimed in respect of residence in the same lodgings to have their names inserted in the list of persons entitled to vote at the election of two members to serve in parliament for the borough.

The notice of objection given by the appellant was, so far as necessary to be stated, as follows:

"To Mr. Thomas Allen:

"I hereby give you notice that I object to your name being retained on the list of persons entitled to vote as lodgers at the election of members to serve in parliament for the city of Westminster, on the following grounds" (which the notice then proceeded to state).

"Dated this twenty-fifth day of August, one thousand eight hundred and seventy-nine.

(Signed) "Joseph Mortlock,
"of No. 6, Cambridge Villas,
"Waterford Road, Fulham.

"On the list of voters [for No. 7, North Street], for the parish of St. John the Evangelist (called list No. 3)."

1879

MORTLOCK v. FARRER.

The notice was regular in all respects, except in the following particulars, namely:

The said Thomas Allen objected that such notice was invalid and void in law, inasmuch as it did not specify upon which list of persons entitled to vote as lodgers for the election of members for the said borough his name appeared.

There are eleven parishes and precincts within the borough, each having its own overseers; but for one of such precincts there was on the register of voters no lodger.

As to the remaining ten parishes or precincts the overseers of each parish or precinct made out, in obedience to the 22nd section of the Parliamentary and Municipal Registration Act, 1878, such a list as is mentioned in the first paragraph of the case.

The revising barrister decided that the notice of objection, and a number of similar notices in other cases, ought to have specified upon which of the said ten lists respectively the names of the persons so objected to appeared.

The objector applied for leave to go into the merits of the various objections. This was opposed on behalf of the parties objected to, and the barrister rejected the application. If the Court should be of opinion that his decision was wrong the register was to be amended by erasing the name of Thomas Allen from the list, unless it should be of opinion that, regard being had to the facts herein stated, the name ought nevertheless to be retained on the list. (1)

Sir H. Giffard, S.G. (*Douglas Kingsford*, with him), for the appellant. The barrister was wrong. The lodger franchise is conferred by 30 & 31 Vict. c. 102, s. 4, sub-s. 2. Where a person is entered in respect of lodgings on the register, and desires to be entered on the next register, he may claim to be so entered by sending notice of his claim to the overseers of the parish in which his lodgings are situate: 41 & 42 Vict. c. 26, s. 22. (2)

(1) The appeals were consolidated.

(2) 41 & 42 Vict. c. 26 (Parliamentary and Municipal Registration Act, 1878), Schedule Form I. contains a Form No. 1 (Parliamentary), of "Notice of objection to be given to overseers," addressed "to the overseers of the parish of ——."

And a Form No. 2 (Parliamentary), of "Notice of objection to be given to

1879

MORTLOCK v. FARRER.

The form of notice of claim is prescribed by the schedule, Form H. No. 2. It is directed to the overseers of the parish, and contains particulars of the qualification. Forms of notices of objection are also given in the schedule. Form (I.) No. 1 is the notice to be given to the overseers of the parish. No. 2 is the notice to be given to the person objected to. The notice of objection in the present case is according to No. 2. It is unnecessary that the parish of the claimant should be stated. He must know in what parish he lodges, and does not need to be told where the qualification is situate. He cannot be on the lodger list for more than one parish. There is but one lodger list, so the note to the form does not apply. Westminster is not a municipal as well as a parliamentary borough. Therefore the list is not made out in divisions as directed in s. 15.

The question raised is as to the true meaning of the words "the list" in the form. It does not mean parish list. Although the overseers in each parish make out a lodger list, yet "the list" is the aggregate of the lists so made out. "If there is more than one list of parliamentary voters," cannot mean "if there is more than one parish in the borough." There may be a borough with only one class of voters. But generally there are different classes such as freeholders, occupiers, lodgers, in respect of each of which a list is made out. The note requires the kind of franchise, and not the parish, to be indicated.

R. S. Wright, for the respondent, the High Bailiff of Westminster. Although made a party by the revising barrister the

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the person objected to," addressed "To Mr. ——."

The objection being in both notices to the name of the voter being retained on the lists of persons entitled to vote at the election of members to serve in parliament.

At the foot of Form 2 is the following:—

Note.—"If there is more than one list of parliamentary voters, the notice of objection in each of the above two cases, Nos. 1 and 2, should specify the list to which the objection refers, and if the list referred to is made out in divisions, the notice of objection should specify the divisions to which the objection refers; and if the list contains two or more persons of the same name the notice should distinguish the person intended to be objected to."

At the foot of the corresponding Municipal Forms, Nos. 3 and 4, is a note applicable to them, and providing in similar terms to the note above set out, for the case of there being "more than one burgess list."

1879

MORTLOCK v. FARRER.

respondent is uninterested in the appeal. It may however be suggested as an argument that the word "list" in the note must mean parish list, or would otherwise be unmeaning in other parts of the Act. The note to Form (I.) No. 4 provides for the case of more than one burgess list. But in municipal boroughs there is only one list. So evidently "list" means parish list in No. 4. In *Wansey* v. *Perkins* (1) the Court assumed that "list" as used in the note to the Form prescribed by 6 & 7 Vict. c. 18, meant parish list, and the terms of that note are repeated in the present one.

[LORD COLERIDGE, C.J. The notice of objection in *Wansey* v. *Perkins* (1) did not specify the parish, but was held good.]

Because the case arose in the city of London where only one list is made out by the overseers. In Rogers on Elections, 12th ed. App. p. cclx. the Form of objection to voters for counties which is given in Schedule (A.) of 28 & 29 Vict. c. 36, is printed with a direction to insert the name of the parish before the word "list." In large boroughs a voter may have a qualification in different parishes.

The whole machinery of the Act is worked in each parish by its overseers. They are to make out the lists: s. 15. In sub-ss. 2, 5, and 6 the "list for the parish" is mentioned. By s. 22 a lodger list must be made out for each parish. See also the Precept in the schedule Form (A.)

Sir H. Giffard, S.G., replied.

HALL v. CROPPER.

HALL v. CROPPER.

APPEAL from the revising barrister for the borough of Nottingham.

At a revision court objection was made to the name of Arthur Bosworth being retained upon the list of persons entitled both to be registered as parliamentary voters in respect of the occupation of property situate within the parish of St. Mary, in the borough of Nottingham, and to be enrolled as burgesses for the municipal borough of Nottingham in respect of the occupation of property situate within the parish.

(1) 7 M. & G. 127.

The borough of Nottingham is a parliamentary and municipal borough. The parliamentary borough consists of the parishes of St. Mary, St. Peter. and St. Nicholas. The municipal borough consists of those parishes and certain other adjoining parishes or parts of parishes.

The overseers for each of the parishes of St. Mary, St. Peter, and St. Nicholas respectively published for the purposes of the registration of 1879 separate lists for each parish, viz., in each parish a list of the persons entitled both to be registered as parliamentary voters and to be enrolled as burgesses in respect of the occupation of property (Division 1), also of the persons entitled to be enrolled as burgesses, but not to be registered as parliamentary voters (Division 3). They also published in each parish a list of lodgers who had claimed under the provisions of the Parliamentary and Municipal Registration Act, 1878, s. 22. And a list of persons entitled to the parliamentary franchise as freeholders (the ownership of freehold property being a qualification for a parliamentary vote in the borough of Nottingham).

It did not appear that there were any persons (other than lodgers) entitled to be registered as parliamentary voters in respect of the occupation of property, but not to be enrolled as burgesses, and no division of the list in respect of any such was made.

Notices of objection to several parties objected to had been given. They were in the Forms Nos. 2 and 4 of Form I. But it was objected that the notices did not specify the list to which the objection referred, as required by the note to Form I., for the following reason:

The notices did not specify the list for any particular parish in the borough as the list to which the objection referred, but merely referred to the list of persons entitled to vote as occupiers, or as freeholders, or as lodgers, as the case might be, for the borough (parliamentary or municipal, as the case might be,) generally.

The revising barrister decided in favour of the objection to the notices of objection, being of opinion that, having regard to the words (in the note to Form I. aforesaid), "If the list referred to is made out in divisions, the notice of objection should specify the division," and to the fact that it is the list for the parish that is directed to be made out in divisions by sub-s. 2 of s. 15, the list

1879

HALL v. CROPPER.

for each parish must be taken to be a separate list for the purposes of the words, "if there is more than one list of parliamentary voters" in the note to Form I.

It was not shewn that in the particular cases objected to the party objected to was upon the list in any but one parish.

The revising barrister retained the names of the parties objected to on the list. The question raised was whether he was right in doing so. (1)

Ridley, for the appellant. The objection is the same as in the last case, except that the voters claim as occupiers and freeholders. The form seems to be copied from that prescribed by 6 & 7 Vict. c. 18, Sched. B. No. 10, on which *Wansey* v. *Perkins* (2) turned. The note there was appended to the notice of objection to the overseers only, and not to the notice to the party. The note in the new Act applies to both forms. "List" in it must mean the same whether the note is applied to Form No. 1 or Form No. 2. Yet it has not been argued that it is necessary to give the overseers notice of the parish. Their parish is expressly named in the address of the notice to the "overseers of the parish of" whatever it may be. There is only one form of objection to both lodgers and householders. No distinction can be made between them. In *Wansey* v. *Perkins* (3) Tindal, C.J., said, "There is no very great hardship imposed on a party who has received a notice of objection, in the first place to make some inquiry of the objector, or to go himself, or to send some one else, to examine the list of the parties objected to in the parishes in which he may have property."

Graham, for the respondent. Before 6 & 7 Vict. c. 18, the list need not have been specified. That Act remedied the inconvenience of not specifying the list as far as the overseer was concerned, but not so with respect to the party objected to. In that Act was the form for counties. Then there was only one list for the county, and the parish had to be stated in the notice. But in 41 & 42 Vict. c. 26, it became necessary that the form should indicate not only the list for the particular parish, but of the various

(1) The appeals were consolidated. (2) 7 M. & G. 127.
(3) 7 M. & G. 127, at pp. 140, 141.

franchises. "List" there means "list for the parish," and not "register." Notice of the parish to the overseer may be unnecessary; but there is no reason why the voter should not be informed of the parish to which the objection applies. By the earlier legislation he was left to find it out for himself. In *Wansey* v. *Perkins* (1) the objection was that the notice did not state the parish. The Court said the notice to the overseers was sufficient, and as to the notice to the party, there was no note to the form. The argument was that the note should be brought down from the Form 10 of Notice to the overseer to Form 11 of Notice to the party. The decision is not an authority against the respondent. The note is now applied to both forms, and the question is as to the word "list." It is used sometimes in the singular and sometimes in the plural, throughout the Act, but in municipal cases always in the plural. There is, perhaps, now no borough in England in which only one list is made out, as when the earlier Acts passed. It is clear from the language of s. 15 that the list which is mentioned in the note as being made out in divisions is the list for the parish. The objector must state what list in what parish he refers to. The list of voters means, as in *Moon* v. *Andrew* (2), the list for the particular parish. The objector has not complied with the requirements of the note, as he has not informed the voter of the parish to which the objection is directed.

Douglas Kingsford, appeared for the town clerk of Nottingham.

[LORD COLERIDGE, C.J. We should not visit the town clerk with costs if he stands neutral.]

He was made a respondent, but takes no part in the contention.

Ridley, in reply, being asked by the Court to address his argument to the point raised on the note to the Municipal Form of objection, suggested that it was probably taken from the Parliamentary Form, and appended to the Municipal Form without sufficient consideration of the effect.

LORD COLERIDGE, C.J. I am of opinion that the revising barristers were wrong in both cases, and that the appeals must be allowed. The objector in both cases gave notice of objection in

(1) 7 M. & G. 127. (2) Law Rep. 4 C. P. 461.

1879

HALL v. CROPPER.

Lord Coleridge, C.J.

the exact form prescribed by the Parliamentary and Municipal Corporations Act, 1878. "I hereby give you notice that I object to your name being retained on the list of persons entitled as," in the Nottingham case "occupiers," in the Westminster case, "lodgers," and then certain grounds of objection are stated, and the notice is dated and signed rightly by the objector, as a person on the list of freemen entitled to vote in the election of members for the borough of Nottingham in the one case, and on the list of voters for the parish of St. John the Evangelist in the Westminster case.

The only difference between the two cases, and that, I think, is none in point of law, is that in the Westminster case the parties objected to were claiming as lodgers, and in the Nottingham case, they claimed not as lodgers but as occupiers, or in some other capacity entitling them to the franchise. For reasons which I will presently state, there seems to me no real distinction between the two cases. The objection has been raised on a note appended to the Notice of Objection, Form I. The question for us to determine is what is the meaning of the word "list" in that note. The notice "should specify the list to which the objection refers." The argument for the appellant is shortly this: that the parliamentary list for boroughs is made up of persons who claim to be on it in respect of divers sorts of franchises, as freemen, lodgers, 10*l.* householders, and others whose rights are reserved in the Representation of the People Act, or franchises acquired for the first time under the later statute; and that the list referred to in the note is the list of voters under each head of franchise separately; and that the information to which the voter is entitled by this note is as to which list—having reference to the diversity of franchises—the objector objects. The argument on the other side is that, inasmuch as in many boroughs there are more parishes than one, and as the overseers in each parish have to make out more than one list, and as in parliamentary boroughs they may have to make out a list under different heads of franchises, and as the voter may claim to exercise the franchise in respect of various parishes in boroughs, he is entitled to know to what parish the objector objects, and that there was no such information conveyed to him in the present cases. If therefore

the contention of the respondents is right, that the lists were parochial lists and the information was parochial information, they are entitled to succeed, for no such information was conveyed. But it is said that the information ought really to be as to what kind of franchise the objector objects to. If the case stood alone, and I had relied on my recollection of former revision Courts and my knowledge of old boroughs, I could not say there might not be a great deal in both these contententions and much doubt as to the proper interpretation of the Act. Both cannot be true, for the note applies to the two forms of objection, the terms are that "the notice of objection in each of the above two cases should specify the list to which the objection refers." I must therefore interpret the note so as to make it reasonable with respect to both forms of objection, viz., that to be given to the overseers and that to be given to the person objected to. But this is not the only help to the interpretation, for in the Act itself the word "division" is expressly confined by the enactment to the sort of division pointed out in sect. 15, and that division is not a parochial divison but a division which is to be made in each parish separately. In each parish separately a list is to be made out in three divisions. One for persons entitled both to be registered as parliamentary voters and to be enrolled as burgesses; one for those entitled to be registered as parliamentary voters but not to be enrolled as burgesses; and one for those entitled to be enrolled as burgesses but not to be registered as parliamentary voters, and the words in the note are clearly directed to these three distinctions. Therefore, I find a statutory interpretation of divisions, which is a considerable help to me; but the argument does not rest there, for by the Act we are referred to the earlier Registration Act, 6 & 7 Vict. c. 18, which was the Act which first formed, as it were, a code of registration law, was drawn with great care, was the subject of many decisions, was incorporated in the present Act in express terms, and which also enacted that the terms used in this Act shall have the same meaning as in the Parliamentary Registration Acts, one of which is the Act of 1843, 6 & 7 Vict. c. 18. That Act dealt both with county and borough registration, and it had a variety of forms kept carefully separate—forms applicable to the county and forms applicable to boroughs,—

1879

HALL v. CROPPER.

Lord Coleridge, C.J.

and amongst them are forms of objection to the overseers, and to the parties in counties, and to the overseers and to the parties in boroughs.

The county form of notice of objection to the overseer is silent in its text as to the locality of the franchise to which the person objects. It is said, with obvious reason, that, inasmuch as the overseer has jurisdiction only over a local area, the notice of objection can only be to him acting in that area. Therefore, the notice can only refer to his parish. He is an officer of local jurisdiction acting within a certain local area, and notice is to be given to him within it. But in notices of objection to the party claiming a county vote it is expressly enacted in the body of the notice itself that the parish shall be stated. Therefore, a notice to such person which did not state the parish would be bad. But in the form of notice in boroughs prescribed by the old Act there is not a word about parish, either with respect to the overseers or with respect to the party. With respect to the overseer the same observations may be made as in the case of the county. The objection is to him acting within a local area. But when we come to the form of objection to the party in boroughs in the old Act there is not a word about parish, which is the more remarkable, because in the same Act where the notice of objection is to a county voter the parish must be stated. Such being the case under the old Act incorporated with the Act of 1878, the terms of which are to be as far as possible construed in the same way as those of 6 & 7 Vict. c. 18, we find this: that, whereas in 6 & 7 Vict. c. 18, there was a note appended to the notice to the overseers in boroughs saying that if there were two lists or more than one list, the list which was objected to should be specified in the notice of objection, and that note was left out in the notice of objection to the party, we have now the very same words, or words not distinguishable, used in the note made to apply in each of the two cases, viz., to notice of objection to the overseer and notice of objection to the party. This seems to me to follow: The new Act uses words of the old Act, adopts the notices of the old Act, is by special enactment to be construed as the words of the old Act are to be construed, and in the old Act it is impossible to construe the words as having the sense which it is contended that

they have in the new Act. It is possible to interpret the words in the later Act as they must have been interpreted, if we were dealing with them in the old Act, and I for one am content to so interpret them. They are the same words and in pari materiâ, and I think it impossible to construe them differently. There is very little authority on the point, for I think *Moon* v. *Andrew* (1) inapplicable. There the Court held in effect that the words "borough of Penrhyn" sufficiently indicated the old borough, which was one of the six districts composing the larger parliamentary borough of Penrhyn, and in respect of each of which a separate list was made out.

The other case *Wansey* v. *Perkins, Quigley's Case* (1) appears to me to be very much in favour of the appellants. The question there arose as to London, which in some respects differs from other boroughs. There the overseers have to make out only one list, because the other lists are made out by the clerks to the city companies and other officials not overseers: and the Court held that a notice of objection to the overseer which specified no list was perfectly good because, as the overseer made but one list and the other lists were not made by him, a notice of objection to the overseer, to Quigley's name being retained on the list of voters, would only apply to the one single list which the overseer had made out, and strong expressions were used by the Court, and especially by Tindal, C.J., shewing that they thought the notice which was to be given to the voter under that Act need not specify the particular list because there was no hardship in withholding such information. In a county where a voter had qualifications in many parts of it there might be hardship in giving him notice of objection without telling him the locality of the qualification to which the objection is made. But no hardship, as the Lord Chief Justice points out in the above case, arises here. There certainly is none in the case of a lodger who is obliged year by year to make a local claim on local officials in order to retain the franchise. If, therefore, he is objected to as a lodger he must know what franchise it is and where the place of qualification is to which the objection is made, because no one lodges in two places at the same time. He must know not only the character but the locality of

(1) Law Rep. 4 C. P. 461. (2) 7 M. & G. 127.

1879

HALL v. CROPPER.

Lord Coleridge, C.J.

the qualification. It is conceded that in other cases there may be more difficulty. In the case of freemen there is no difficulty, and in the case of occupiers it is difficult to conceive any hardship arising, it is just possible that a man might have two or three qualifications in several parishes, but the answer is to be found given by Tindal, C.J., in *Wansey* v. *Perkins*. (1)

My conclusion is that the requirement that the notice of objection should "specify the list to which the objection refers" means specify the character of the qualification with respect to the different kinds of franchise which are the subject of lists variously made out. I do not deny that there is much in the objection raised by Mr. Wright on the fact of a similar note being appended to the two forms of municipal notices of objection. The note there is not free from difficulty, and I cannot give an adequate interpretation to it. I do not think that it means in the municipal notice that the parochial list should be specified. For the reasons I have given I do not think it can mean that. It is a somewhat humiliating confession to make, but I admit that I am unable to say what it does mean. But the difficulty arising from the latter note is not sufficient to outweigh the difficulty of adopting the respondent's argument on the earlier one.

Therefore I am of opinion that on the whole the appellant was right in his objection, and the revising barrister wrong in his decision on both cases.

GROVE, J. I am of the same opinion. I should have had great difficulty in coming to a conclusion but for the fact that the note in Form (I.) expressly applies to the forms of notice to be given to the overseers and to be given to the persons objected to. The note, if we assume that the lists for different parishes are to be taken as comprised in the words, "If there is more than one list" of voters, cannot be reasonably applicable to the form of notice to the overseer, for the overseer must know his parish for which he has made out his list, and, moreover, the very notice itself is addressed to the overseers of such and such a parish. So, supposing the distinction of separate parishes is to constitute separate lists or "more than one list" the note is unmeaning in application

(1) 7 M & G. 127.

1879

HALL v. CROPPER

Grove J.

to the notice of objection to the overseer. I must, therefore, give some other construction to it. From the judgment of the Lord Chief Justice it appears that the note in question is almost a copy of the note in the previous Act, in which Act the word list clearly meant more than one list in respect of the franchise or qualification, and this gives rise to the forcible argument that where the legislature uses the same language in an Act in pari materiâ the same construction should be given to it. I think that Parliament here using the same language meant the same thing. The note is not merely general, but in very special terms provides that the notice of objection in each of the two cases, Nos. 1 and 2, viz., the objection to be given to the overseer, and the objection to be given to the voter, should specify the list to which the objection refers.

I cannot think that latter sentence which is so specific has no meaning. The legislature must have intended something which is applicable to both of those two cases. It can only be applicable to both of those cases by giving it one meaning when applying to overseers, and giving it a different meaning when applied to the party objected to. Reading the words "if there is more than one list," &c., to mean in the case of notice to the overseer "more than one list in respect of the franchises," but to mean, when applied to the party objected to, "parochial list," a different meaning is given to the same word in the same sentence. That construction has led my mind, which was wavering, to the conclusion that the appellants are entitled to judgment. I was much impressed by the argument of Mr. Wright as to the Municipal Form which provides that, if there is more than one burgess list, the notice of objection should specify the list to which the objection refers. It is said that there can only be one burgess list. I, at first, thought therefore that the note might by "list" refer to divisions of a list made out in divisions, and that in parliamentary boroughs there might be two lists. But when I read the subsequent part of the note, I found that the case of divisions is expressly provided for. Therefore I cannot construe "list" as meaning "division" when a distinction is plainly drawn between the two. I must leave the note to the Municipal Form, as the Lord Chief Justice left it, unexplained. I do not think that we

1879

HALL v. CROPPER.

Grove, J.

must assume that the words were thoughtlessly copied out, or used in error. Such a principle of construction might always be resorted to when the matter of an Act of Parliament seemed insoluble or objectionable. I cannot explain the note to the Municipal Form. But I do not think that the difficulty which it creates is strong enough to outweigh the argument founded on the parity of the two Acts and the general reasoning upon them. Our construction is fair and reasonable if we construe "list" in the note to Form (I.) No. 2, as franchise list, and the word cannot be fairly and reasonably construed otherwise.

LINDLEY, J. I am of the same opinion. Both cases turn on the true construction of the note to Form (I.) No. 2, in the schedule of the Parliamentary and Municipal Registration Act, 1878, and s. 8 provides that "the said schedule and the notes thereto shall be construed and have effect as if enacted in the body of this Act." The words of the note which raise the difficulty are "if there is more than one list of parliamentary voters." There may be more than one list of parliamentary voters under more circumstances than one. If there are more parishes than one in the borough, there must be more than one list. On the other hand, there are several lists made out by the overseer in each parish. So there may be several lists because of several parishes, or several lists because each overseer has to make out several.

Mr. Ridley's argument is unanswerable, viz. that if the word "list" in the note is applied to the notice of objection to the overseers, it cannot mean the list made out by other overseers than those in the claimant's parish, for that would be nonsense. So that it must mean the several qualification lists made out by the overseers, who undoubtedly make out several such lists. Well, having got the meaning of the words in the case of the overseer, it would be a strong thing to say they mean something else when applied to the party objected to, and I see no sufficient reason for construing the same words in two different senses. Mr. Graham said that the object of the provision in the note is to give the same amount of information to the party as to the overseer, but the answer is that you cannot do that without straining the meaning

1879

HALL v. CROPPER.

Lindley, J.

of the words, which I do not feel at liberty to do. Our construction is fortified by looking at the forms, and observing that the objector has to state his parish. So that when the parish has to be specified we find the word put in by the legislature. Therefore there is no difficulty but that pointed out by Mr. Wright, and as to that I am in the same position as the Lord Chief Justice and my Brother Grove. I fail to see the full meaning of the note to Form 4. But it is quite plain in the present case, whatever it may be in others. I think the revising barrister has disallowed the notice of objection when he should have allowed it.

Decision reversed.

Solicitors for appellant Mortlock: *Rogerson, Ford, & Co.*
Solicitor for respondent Farrer: *Farrer.*
Solicitors for appellant Hall: *Ellis, Monday, & Co.*
Solicitors for respondent Cropper: *Torr & Co.*

FOSTER AND OTHERS, APPELLANTS; MEDWIN AND ANOTHER, RESPONDENTS.

1880
Feb. 26.

Parliament—Borough Vote—Qualification—Parish, Alteration of—2 & 3 *Wm.* 4, *c.* 45, *ss.* 5–7; *c.* 64, *s.* 35, *Sched. O*—39 & 40 *Vict. c.* 61, *ss.* 1, 3, 4.

A right to vote in respect of a qualification within an isolated part of a parish at parliamentary elections for a borough comprising that part is not affected by an order made under the Divided Parishes and Poor Law Amendment Act, 39 & 40 Vict. c. 61, amalgamating the part with a parish beyond the limits of such borough.

APPEAL from the revising barrister for the borough of Horsham.

Objection was duly made to the names of the appellants being retained on the list of persons entitled to vote at the election of a member of parliament for the parliamentary borough of Horsham, in respect of property occupied within the parish of Horsham, on the ground that the alleged qualification was not within the parliamentary borough of Horsham.

The case stated as follows:—

By 2 & 3 Wm. 4, c. 45, the Reform Act, 1832, s. 5, "The borough of New Shoreham shall for the purposes of this Act include the whole of the rape of Bramber in the county of Sussex, save and except such parts of the said rape as shall be included in

1880

FOSTER v. MEDWIN.

the borough of Horsham by an Act to be passed for that purpose in this present Parliament."

By s. 7: "Every city and borough in England which now returns a member or members to serve in Parliament, and every place sharing in the election therewith" (with certain exceptions therein mentioned) "shall, for the purposes of this Act, include the place or places respectively which shall be comprehended within the boundaries of every such city, borough, or place as such boundaries shall be settled and described by an Act to be passed for that purpose in this present Parliament, which Act, when passed, shall be deemed and taken to be part of this Act as fully and effectually as if the same were incorporated herewith."

By 2 & 3 Wm. 4, c. 64 (being the Act referred to in the said 5th and 7th sections of 2 & 3 Wm. 4, c. 45), s. 35, after reciting the above provisions and declaring that the several cities, boroughs, and places whereof the boundaries were so to be settled and described as in the said recited Act is mentioned, are the several cities, boroughs, and places which are specified in the schedule to this Act annexed marked O, it is enacted that the several cities, boroughs, and places specified in Schedule O shall, as to the election of members or a member to serve in Parliament, respectively include the places and be comprised within the boundaries which in such schedule are respectively specified and described in conjunction with the names of such cities, boroughs, and places respectively.

In Schedule O is as follows:—

"Horsham, the parish of Horsham."

By 39 & 40 Vict. c. 61, s. 1: "Where any parish shall be divided so as to have its parts or any of them isolated in some other parish or parishes or otherwise detached, the Local Government Board may, as and when they shall see fit, after local inquiry to be held upon notice duly given to the clerk of the peace of the county or counties in which the parts of the parish are situated and in the parishes to be affected in the manner prescribed or usually adopted therein for the publication of parochical notices, make an order, to take effect at the expiration of some period of not less than three months from the day when a copy of such order shall have been sent to the overseers, either for constituting

separate parishes out of the divided parish or for amalgamating some of the parts thereof with the parish or parishes in which the same may be locally included, or to which they may be annexed, as shall appear to such Board to be most convenient, and providing, where requisite, for a change of the county of the parish or part of a parish.

By s. 3: "From and after the 25th day of March next ensuing the day when such order, if not objected to, shall take effect, and in the case of a provisional order next ensuing the date of the Act of Parliament confirming the same, the several parts of every parish to which such order shall apply shall be and continue to be constituted in the manner directed by the said order, and the officers of the several parishes affected thereby shall be empowered and shall be required to act as if such parishes had been constituted in the manner directed prior to the issue of such order."

Sect. 4: "Nothing herein contained shall apply to the ecclesiastical divisions of parishes, nor to the constitution of school districts, without the sanction of the Educational Department, or shall alter the boundaries of any municipal borough, and for the purposes of the election of members of Parliament and of burgesses in municipal boroughs, of the jury lists, of the action of the justices, and of the police and constables, the parishes shall continue to be deemed unaltered until new lists are made and new constables are appointed."

The appellants claimed to have their names retained on the list in respect of property situated in what was, prior to and until the making of the order of the Local Government Board hereinafter mentioned, an isolated and detached part of the parish of Sullington, known as Broadbridge Heath.

At the date of the order of the Local Government Board, Broadbridge Heath was within the parliamentary borough of New Shoreham as defined in the 5th section of the 2 & 3 Wm. 4, c. 45, and was not within the parliamentary borough of Horsham.

By an order of the Local Government Board duly made pursuant to 39 & 40 Vict. c. 61, the board ordered: "1. All those two isolated and detached parts of the said parish of Sullington known as 'Broadbridge Heath' and 'Broadbridge,' which are

1880

FOSTER v. MEDWIN.

locally included within or annexed to the said parish of Horsham, shall cease to be parts of the said parish of Sullington, and shall be amalgamated with the said parish of Horsham. 2. This order shall take effect on the 1st day of November, 1878."

New lists of voters had been duly made, and new constables had been duly appointed for the parish of Horsham subsequent to the 25th of March, 1879.

The revising barrister decided that the property in respect of which the appellants claimed to have their names retained on the list was within the parliamentary borough of New Shoreham, and was not within the parliamentary borough of Horsham, and that the appellants were not entitled to have their names retained on the list of persons entitled to vote for a member for the borough of Horsham.

The appellants required the barrister to make the returning officer a respondent.

The question was whether the decision was correct.

A. L. Smith, for the appellants. Broadbridge Heath was, prior to the order of the Local Government Board, in the parish of Sullington and the borough of New Shoreham: 2 & 3 Wm. 4, c. 45, s. 5. The parish of Horsham is by 2 & 3 Wm. c. 64, s. 35, comprised in the borough of Horsham. 39 & 40 Vict. c. 61, empowers an order to be made for amalgamating isolated parts of parishes with the parishes in which the same are locally included. But by s. 4, for the purposes of the election of members of Parliament, the parishes shall continue to be deemed unaltered until new lists are made and new constables appointed. An order was duly made that Broadbridge Heath should be amalgamated with the parish of Horsham. New lists were afterwards made and new constables appointed. Broadbridge Heath was thenceforward in the parish of Horsham, and consequently within the borough of Horsham. Therefore the appellants are entitled to have their names retained on the list for that borough.

[LORD COLERIDGE, C.J. If such an alteration of parishes affected the franchise, might not an order of the Local Government Board, throwing a part of a parish out of a borough and into a county, operate so as to disfranchise the voters in that part?]

The converse case might also happen if parts of a parish outside a borough were thrown into it. In the present case the voters would be equally qualified for either New Shoreham or Horsham.

Goldie, for the respondent Medwin. 39 & 40 Vict. c. 61, was not intended to alter the constitution of boroughs so as to affect the franchise, but is, as the preamble shews, a poor law enactment only. Sect. 4 expressly declares that the Act shall not alter the boundaries of municipal boroughs, and the provision at the end of the section merely refers to the duties of overseers in making out parish lists. If the contention for the appellants were right, persons might be disfranchised or enfranchised by an order of the Local Government Board. By s. 1 the board, before making an order, must hold a local inquiry upon notice duly given to the clerk of the peace of the county. If, however, the legislature meant that the order should affect the franchise, they would have provided for notice also to the town clerk and returning officer, 2 & 3 Wm. 4, c. 64, sch. O. Midhurst is an example of isolated parts of parishes in respect of which lists of voters would have to be affixed to the doors of churches in other parishes.

J. F. Clerk, for the returning officer. The words "new lists" in s. 4 do not mean lists of voters, but jury lists only, as the context shews. The provision, omitting the immaterial part, is that for the purposes of the jury lists the parishes shall remain unaltered until new lists are made. Thereupon the parishes are necessarily to be deemed altered as regards jury lists, but not so for the purposes of the election of members of Parliament and of burgesses in municipal boroughs. "Burgesses," there is probably the old form of expression for borough members.

A. L. Smith, replied.

LORD COLERIDGE, C.J. I am of opinion that the decision of the revising barrister is correct and must be affirmed. The question turns on the true construction of certain sections in 39 & 40 Vict. c. 61, one of which I do not profess to understand. Having regard to the preamble and general scope of the provisions of the Act, I think my duty is to interpret the Act, if possible, so as not to affect the parliamentary franchise. The preamble is entirely apart from parliamentary purposes. From it the whole Act

1880

FOSTER v. MEDWIN.

Lord Coleridge, C.J.

appears to be, in fact, a poor-law Act, and the last section, giving the short title, enacts that "This Act may be cited and described for all purposes as 'The Divided Parishes and Poor Law Amendment Act, 1876.'" Therefore, both at the beginning and the end, the very words of the Act confine its operation to poor law purposes. Sect. 1 empowers the the Local Government Board to divide parishes, to make provision for these divided parishes, giving notice to the parishes to be affected, and, if the board think fit, to the clerks of the peace of counties which are to be affected by the division, and to change, for the purposes of the Act, the boundaries of counties. I asked and was told, no doubt correctly, as indeed s. 8 shews, that there are certain parochial purposes, local purposes, for which the county rates are made liable. Therefore the change of counties may be very convenient for the purpose of parochial administration and poor law administration, and as the boundaries of counties for such purposes may be altered, there is a sufficient reason why notice of such intended alteration is to be given to the clerk of the peace. It has been admitted, and indeed is apparent from the statute, that no such corresponding notice is to be given, either to town clerks in boroughs where there is a municipality, or to any person who may be the returning officer or the person interested in a borough which is a parliamentary borough without a municipality, and in this particular case it happens that both are parliamentary boroughs without municipalities.

I now turn to sect. 4, upon which the appellants rely, and certainly I must confess that I am not able to give a clear explanation of the meaning of it. Sect. 4 recites that "nothing herein contained," that is, no change in the parishes, "shall apply to the ecclesiastical divisions of parishes nor to the constitution of school districts, or shall alter the boundaries of any municipal borough"—with all which we have nothing to do—"and for the purposes of the election of members of Parliament, and of burgesses in municipal boroughs, of the jury lists, of the action of the justices, and of the police and constables, the parishes shall be deemed unaltered until new lists are made and new constables are appointed." Then, I suppose, it must follow that when new lists are made and new constables are appointed, the parishes may, for certain

purposes, cease to continue to be deemed unaltered, and shall be altered. What are those purposes? The election of members of Parliament is in some respects a parochial matter, that is to say, certain things have to be done by overseers of parishes, in relation to the election of members of Parliament. The names of persons who have a vote for members of Parliament are placed in lists, and those lists are parochial lists. Parish officers have to make them. Consequently, for some purposes no doubt, this alteration of the parishes will affect the election, not the electors, of members of Parliament; inasmuch as certain things relating to such election will have to be changed. And so with regard to "burgesses in municipal boroughs," whether "burgesses" is there to be construed "members of municipal boroughs," or whether it be, as I think Mr. Clerk rightly said, that it is an old fashioned word for a member of Parliament for a borough; and possibly the section means "for the purposes of burgesses in municipal boroughs," and he has suggested that such purposes are also to some extent parochial, because the lists for many purposes in municipal boroughs are connected with burgesses, that is to say, municipal voters in municipal boroughs, parochial divisions of parishes have to be considered, the overseers have to make lists, and so forth. Therefore, for certain purposes these parishes are to be altered in regard to the election of members of Parliament, and burgesses in boroughs when there are burgesses. Holding to the governing principle that we are not to affect the parliamentary franchise if possible, how can I interpret this section so as to give effect to it without interfering with the parliamentary or municipal franchise? It seems to me that what was suggested in argument is, at any rate, a solution of it, viz., that in this case the portion of the parish of Sullington will be, for certain purposes, attached to the parish of Horsham, but that, as there is no indication that this is to affect the parliamentary borough or the election of members of Parliament, except as to the preparation of lists, all that will follow will be this: that the names of voters in respect of the parts of the old parish of Sullington, which remain in the parliamentary borough of Shoreham, will have to be put into a list stuck upon churches in the parish of Horsham, and the voters will have to vote as they have heretofore voted for the parish of

1880

FOSTER v. MEDWIN.

Lord Coleridge, C.J.

Sullington, in New Shoreham. The fact that the names of voters who do not vote for the place to which the parish belongs, have to be put upon the doors of churches of parishes partly in a borough and partly not, appears, as Mr. Goldie pointed out, to result from many of the definitions and boundaries in the Sched. O in 2 & 3 Will. 4, c. 64, and he is quite right in taking for example the borough that immediately succeeds the borough of Horsham in that Schedule of the Act of Parliament, in which, not only a variety of entire parishes, but of portions of parishes, partly left in the county and partly included in the borough of Midhurst, forms part of the general description of that borough, and, of course, in the parishes which are partly county and partly borough the overseers would have to put upon the doors of their churches in such parishes two lists. They would have to put up the lists of the county voters, and they would have also to put up the lists of the Midhurst voters so far as the borough of Midhurst extends into their parish. That is what the churchwardens and overseers of Horsham will have to do here. They will have to put upon the doors of the churches in Horsham lists of the persons who vote in that part of the new parish of Horsham which is comprised in the old borough of New Shoreham. That seems to me to give an adequate or, at all events, one adequate interpretation to this section. It is plain, that to construe sect. 4 otherwise would be to give to a department of the executive government when making an alteration for poor law purposes in places where to a borough a considerable district is attached—which appears from the old Reform Act to be the case with a great many boroughs in England—the power of disfranchising a large number of persons by throwing them into a county where the county and borough franchises being different, they would not only simply change their votes and get a vote for one borough instead of another, but in a case where there was no conterminous borough, and they were thrown into a county, would probably be disfranchised altogether. That would be a startling conclusion. It is true that it might have a contrary effect, and the same department of the executive government might in other cases bring portions of a county into a borough, and thereby enfranchise some persons who were not there before. I agree, that so far as

the argument rests on disfranchising only, that would not be an unfair answer to make, but the argument remains, that it allows on both sides the enfranchising and disfranchising of, perhaps, large numbers of people, at the discretion of a department of the executive government, a conclusion to which we must come if driven, but should reluctantly come.

For these reasons, therefore, without saying that I can construe this section so as to satisfy my own mind that I have given proper effect to every word of it, it seems to me tolerably clear that it does not mean to affect the parliamentary franchise, or to give the power of disfranchisement or enfranchisement to a department of the executive government, and therefore, having indicated what I think it may mean, it is enough for the decision of this case to say that I have a reasonably clear opinion that the section does not mean what alone would satisfy the claim of the appellants. I think therefore that the appellants have failed in their contention, and that the revising barrister was correct in his view of the Act of Parliament, and that his decision must be affirmed with costs. Quite independently of the help which the learned counsel for the returning officer has given us in the discussion of this case, I think that as he was made a respondent against his will he too ought to have his costs.

LINDLEY, J. I am of the same opinion. I, like my Lord, do not profess to understand the 4th section of this Act of Parliament, but as happens sometimes, so it happens here, that one may, without seeing exactly what a thing does mean, see clearly what it does not mean, and there I may rest. I think it is fairly plain that the section does not mean to affect the franchise at all. My reason for that opinion is this: the Act of Parliament is directed to an altogether different subject matter, and the recital in the preamble shews what its object is. [The learned judge read it.] There is not a word there which justifies the inference that anything affecting the franchise in one way or the other was the object of the Act at all, nor is there the slightest reason for supposing that any alteration whatever was contemplated, except such intention as is to be gathered from the very obscure words of s. 4, on which this case turns. Up to a certain point that section

1880

FOSTER v. MEDWIN.

Lindley, J.

is free from ambiguity, and quite consistent with all the rest of the Act, and the difficulty arises from the introduction of some words, the full effect of which it is very difficult to discover. The parishes shall continue to be deemed unaltered "until new lists are made and new constables appointed." What consequences are to follow when new lists are made and new constables are appointed? Some consequences obviously, and we are asked to say that among the consequences will be this, viz. that the boundaries of this particular borough of Horsham shall be altered for election purposes. Mr. Smith contends that we are forced to say that consequence follows from these words. The answer is that we are not forced to say so if any other consequence can be suggested, and two other consequences have been suggested, one by Mr. Goldie and the other by Mr. Clerk. I think the section admits of Mr. Goldie's construction, though Mr. Clerk's suggestion is to my mind rather the more preferable one, viz. that the only consequence which follows affects the jury lists and the constables. I am not prepared, however, to say which of the two is the right construction, but I am prepared to hold that the words are not sufficiently plain to force us to say that for electioneering purposes —that for the purpose of electing members of Parliament—the boundary of Horsham borough which was fixed by the statute of William IV. has been altered. The words do not say so, and we are not driven to say so; and as the words do not say, and we are not driven to say so, I say no more except that I think the appeal must be dismissed with costs.

Appeal dismissed, with costs.

Solicitors for appellants: *Robinson, Preston, & Stow.*
Solicitors for respondents: *Robinson, Preston, & Stow.*

SPENCER, APPELLANT; HARRISON, RESPONDENT. 1879

Parliament—County Vote—Equitable Interest in Copyhold Lands—2 Wm. 4, c. 45, s. 26—30 & 31 Vict. c. 102, s. 5. Dec. 19.

A testator devised copyhold cottages to trustees upon trust to sell and to stand possessed of the proceeds and pay the interest, dividends, &c., to his wife during her widowhood, and, after her decease or marriage, upon trust for his children who should be living at the time of his decease; the share of a son or sons to be vested and payable to him or them on attaining twenty-one, and the share of a daughter to be vested at twenty-one or marriage, and to be to her sole and separate use.

The wife predeceased the testator; and the surviving trustees were admitted as customary tenants of the cottages.

The testator left three sons and a daughter: the latter married and had issue, who were infants. Pursuant to a verbal arrangement amongst themselves (in which agreement the daughter's husband had concurred, but to which the trustees were no parties), the cestuis que trustent agreed to keep the cottages unconverted; and the rents (about 50*l.* per annum) were received by the trustees and divided amongst them:—

Held, that, inasmuch as one of the cestuis que trustent was a married woman and had issue who were infants, no election could be made to take the cottages in their actual state, and so determine and extinguish the converting trust; and consequently that the testator's sons had not such an estate (legal or equitable) in the copyhold cottages as to entitle them to be registered as voters for the county under 2 Wm. 4, c. 45, s. 26, and 30 & 31 Vict. c. 102, s. 5.

AT a Court held for the revision of the lists of voters for the north-east division of the county of Lancaster, S. J. Harrison duly objected to the name of C. G. Spencer being retained on the register of voters for the township of Briercliffe-with-Extwistle, in respect of "share of copyhold cottages."

1. Lawrence Catloar Spencer duly made and executed his last will on the 8th of December, 1865, whereby he bequeathed his personal estate and gave and devised his real estate to the use of his wife Sarah Spencer and J. Isherwood and E. Garlick, their heirs, &c., upon certain trusts, that is to say,—Upon trust that they and the survivors and survivor of them, and the heirs, &c., of such survivor, do and shall as soon as conveniently may be after my decease absolutely sell and dispose of the said hereditaments and premises, either entirely and all together or in parcels, and either by public auction or private contract, for such price or prices as

1879

SPENCER v. HARRISON.

they, or the survivors or survivor, &c., shall think reasonable, &c.; and do and shall stand possessed of and interested in the purchase-money to arise from such sale or sales, upon trust to pay debts, &c., and do and shall lay out and invest the residue of the said moneys in the public funds, &c.; and I declare that the said trustees or trustee shall pay the interest, dividends, and annual proceeds of the said trust moneys unto or permit and suffer the same to be received by my said wife Sarah Spencer during her life or so long as she shall continue my widow: And from and immediately after her decease or marriage, I direct that my trustees or trustee shall stand possessed of the said trust moneys, &c., Upon trust for all and every my child or children who shall be living at my decease, &c., to be equally divided between them, the share or shares of such of them as shall be a son or sons to be vested and payable to him or them on his or their attaining the age of twenty-one years, and the share or shares of such of them as shall be a daughter or daughters to be vested in her or them on her or their attaining the age of twenty-one years or day or days of marriage, which shall first happen; and, if there be but one such child who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, then the whole to be in trust for such only child: and I direct that my said trustees or trustee do and shall lay out and invest the shares or share of each of my said daughters or daughter in the purchase of stocks, &c.; and do and shall during the life of each such daughter pay the interest, &c., of her said share, &c., to such daughter for her sole and separate use, &c., and, from and after the death of each such daughter, do and shall stand possessed of the share hereinbefore given to her of the said trust-moneys, and the interest and annual produce thereof, Upon trust for all and every or such one or more of the children of such daughter, with such provisions for their respective maintenance, education, or advancement, and, if more than one, in such parts, shares, and proportions, and upon such conditions and with such restrictions as such daughter, whether covert or sole, shall by her last will and testament in writing, or any codicil or codicils thereto, or any writing or writings in the nature of or purporting to be a will or codicil, at any time or times direct or appoint; and, in default of such appointment, &c., in trust for all and every the

child of each such daughter as shall be living at her decease, who, being a son or sons, shall attain the age of twenty-one years, or being a daughter or daughters, shall attain that age or marry; and, if there shall be but one such child, the whole to be in trust for such one child.

2. The cottages in respect of a share in which the appellant claimed to vote are copyhold of inheritance of the manor of Ightenhill, and are situate at Haggate, in the township of Briercliffe-with-Extwistle, and are part of the real estates devised by the will of L. C. Spencer.

3. The testator died on the 1st of May, 1872, leaving three sons (the appellant and two brothers) and one daughter him surviving.

4. Sarah Spencer, the wife of the testator, and one of the trustees and executors named in his will, predeceased the testator, having died on the 4th of December, 1869.

5. J. Isherwood and E. Garlick, the surviving trustees and executors of the will, duly proved the will in the district registry of Lancaster on the 17th of July, 1872, and they were on the 8th of September, 1873, duly admitted to the said copyhold cottages at Haggate, according to the custom of the manor of Ightenhill, as surviving trustees under the will of the testator; and they are now customary tenants of the said cottages, upon the trusts and for the purposes of the said will.

6. The testator's daughter in the year 1866 intermarried with and is now the wife of John E. Garside, and has issue, who are infants.

7. All the children of the testator are of full age; and, in accordance with a verbal arrangement amongst themselves (in which the said J. E. Garside concurred) had agreed to keep unconverted the said copyhold cottages at Haggate; and the rents thereof were received by Isherwood and Garlick as such surviving trustees of the said will, and divided amongst the testator's children.

8. The rents arising from the copyhold cottages amount to 50*l.* per year, or thereabouts; and the appellant's share of such rent exceeded 10*l.* a year, and was sufficient in point of value or amount to confer the franchise.

1879

SPENCER v. HARRISON.

9. It was contended on the part of the objector, that, inasmuch as S. E. Garside, one of the parties beneficially entitled to a share of the income for life from the moneys to arise from the sale and conversion of the testator's real estate under the will of the testator, was a married woman and had issue who were infants, no election could be made to take the cottages in their actual state, and so determine and extinguish the converting trust; and also that the surviving trustees were no parties to the verbal arrangement; and that Spencer was not entitled to have his name inserted on the list of voters in respect of the said qualification.

10. It was argued on the part of Spencer, that, inasmuch as the share of S. E. Garside was settled under the will to her separate use for her life, independent of her husband, she was as much capable of making an election, although she had infant children interested in the trust-funds, as if she had still been a a feme sole, and that accordingly no deed was necessary to ratify such election.

It was further contended on the same behalf, that, even when real property left by will is directed to be sold and converted into money, the franchise would attach in favour of the person or persons for the time being entitled to and receiving the rents or income thereof, such rent or income being of sufficient annual value, until the moment of such conversion actually taking place, in the same manner as it was contended that partners in a trading concern are entitled thereto in respect of partnership property which, though in its nature real, is in equity or by the terms of the partnership deed considered as personalty.

The revising barrister concurred in the view held by the objector, and expunged the name of C. G. Spencer from the list, as well as those of two other persons whose claims to be registered depended on the same facts and circumstances.

If the Court should be of opinion that his decision was wrong, the register was to be amended by restoring the names of C. G. Spencer and of the other two persons to the several lists of voters.

Henn Collins, for the appellant, submitted that he took under the will of his father Lawrence Catlow Spencer an equitable estate for life in the copyhold cottages in question so long as they remained

unsold, and was therefore entitled to be registered under 2 Wm. 4, c. 45, s. 26, and 30 & 31 Vict. c. 102, s. 5. He cited *Cassamajor* v. *Strode*, in the note to *Walker* v. *Shore* (1); *Baxter* v. *Brown* (2); *Myers* v. *Perrigal* (3); *Bennett* v. *Blain* (4); *Ashworth* v. *Hopper* (5); *Miller* v. *Miller* (6); *Franks* v. *Bollans*. (7)

No one appeared for the respondent.

Cur. adv. vult.

Dec. 19. The judgment of the Court (Lopes and Lindley, JJ.) was delivered by

LINDLEY, J. The question we have to determine is, whether the appellant, Spencer, has, under the above will and parol agreement postponing the sale of the devised copyholds, any such interest in them as entitles him to a vote for the county of Lancaster. The revising barrister has decided this question in the negative; and we have to determine whether his decision is correct.

The appellant clearly had no legal estate; and his right to ~~sale~~ vote depends entirely on his equitable estate, if any, in the copyhold lands devised for sale.

Before the Reform Act (2 Wm. 4, c. 45), s. 19, copyhold lands conferred no qualification; and before 7 & 8 Wm. 3, c. 25, s. 7, equitable interests conferred none. At the present time, the right of a person to vote in respect of an equitable interest in copyholds depends on 30 & 31 Vict. c. 102, s. 5, which is as follows:— "Every man shall, in and after the year 1868, be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in parliament for a county, who is qualified as follows, that is to say, 1. Is of full age, and not subject to any legal incapacity, and is seised at law or in equity of any lands or tenements of freehold, copyhold, or any other tenure whatever, for his own life, or for the life of another, or for any lives whatsoever, or for any larger estate, of the clear value of not less than 5*l.* over and above all rents and charges payable out of or in respect

(1) 19 Ves. 390.
(2) 7 M. & G. 198.
(3) 21 L. J. (Ch.) 434.
(4) 15 C. B. (N.S.) 518; 33 L. J. (C.P.) 63.
(5) 1 C. P. D. 178.
(6) Law Rep. 13 Eq. 263.
(7) Law Rep. 3 Ch. 717.

1879

SPENCER v. HARRISON.

of the same, or who is entitled, either as lessee or assignee, to any lands or tenements of freehold or of any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years (whether determinable on a life or lives or not), of the clear yearly value of not less than 5*l.* over and above all rents and charges payable out of or in respect of the same: Provided that no person shall be registered as a voter under this section unless he has complied with the provisions of s. 26 of 2 Wm. 4, c. 45."

The 26th section of 2 Wm. 4, c. 45, here referred to, is as follows:—"No such person shall be registered in any year in respect of his estate or interest in any lands or tenements as a freeholder, copyholder, customary tenant, or tenant in ancient demesne, unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof for his own use for six calendar months at the least next previous to the last day of July in such year, which said period of six calendar months shall be sufficient, any statute to the contrary notwithstanding."

These enactments shew that, to entitle the appellant to vote in this case, he must establish,—1. That he is seised in equity of the copyholds in question for his own life or the life of another, or for some lives, or for some longer estate,—2. That he shall have been in the actual possession of the lands, or in the receipt of the rents and profits thereof for his own use for six calendar months at least next before the last day of July previous to his entry on the register.

We are of opinion that the second of these requisites is established; for, it is stated that the trustees received the rents, and divided them amongst the cestuis que trustent. The appellant, therefore, was in the receipt of his share of the rents.

We proceed to consider whether he was seised in equity of the copyholds for such an estate as the statute requires. This inquiry involves two others, viz. 1. Has the appellant any beneficial interest in the land? 2. If he has, what is the nature of such interest? The will does not contain any express trust of the lands or rents until sale: but there is an implied trust of them for the appellant and other persons entitled to the proceeds of sale. By virtue of this implied trust, the appellant is entitled in equity to

a share ($\frac{1}{4}$th) of the rents and profits of the land until sale: *Casamajor* v. *Strode*. (1) But an interest in the rents and profits of land is an interest in the land itself: Co. Litt. 4 b. Consequently, the appellant has an equitable interest in the land until sale. He is not in the position of a person who has only an interest in so much money charged on land. This is shewn by *Franks* v. *Bollans* (2), where it was held that a married woman who had a similar interest to that of the appellant could not transfer that interest without an acknowledged deed. The equitable interest of the appellant in the lands amounts therefore to this,—first, he has a right to have them sold,—secondly, he has a right to his share of the rents until they are sold. But this is all: and we are of opinion that this is not a seisin in equity of the copyholds for such an estate as the statute requires. If the appellant can be correctly said to be seised in equity of any estate in the copyholds, which we do not think he can, we are of opinion that his estate is not an estate for life, or any larger estate.

The period of sale, or, in other words, the determination of the appellant's interest, is wholly uncertain: it depends on the trustees and the cestuis que trustent. It is even possible that no sale may ever be made under the trusts of the will; for, the land may remain unsold until all the cestuis qui trustent are of age and capable of electing to keep the land unsold. Is such an uncertain interest as this a freehold interest determinable upon a contingency, or is it at an interest at will? If the appellant is seised of an equitable estate of freehold determinable, he is entitled to be on the register: *Ashworth* v. *Hopper* (3); if not, he is not.

An uncertain interest in land, i.e. an interest determinable on a contingency which may or may not happen, is in almost all cases a freehold interest, unless the contingency depends on the will of the person creating the estate or his successors in title: see Serjeant Manning's notes in 2 M. & G. 19, and 7 M. & G. 45, and the authorities there cited. Speaking generally, we agree with Serjeant Manning in thinking that every interest in land of uncertain duration (though not expressed to be for life) determinable by

(1) 19 Ves. 390, n. (2) Law Rep. 3 Ch. 717.
(3) 1 C. P. D. 178.

1879

SPENCER v. HARRISON.

matter subsequent which is the subject of human agency,—as, where it is determinable at the will of a stranger,—constitutes a freehold for life. We say speaking generally, because there are exceptions to the rule thus stated; for example, estates created by will for the payment of debts, and determinable when they are paid, are regarded as chattel and not freehold interests: Co. Litt. 42 a. Further, a tenant by elegit has only a chattel interest determinable when his judgment is satisfied (Co. Litt. 42, a.), and not a freehold interest, although there is some uncertainty as to the duration of his estate.

On the other hand, an estate of uncertain duration determinable on the will of the grantor or lessor, or of their successors in title, is generally speaking an estate at will, and not a freehold: see Litt. 68, and Co. Litt. 55, a.; Com. Dig. *Estate by Grant* (H. 1.); *Fernie* v. *Scott.* (1) It is true that Brudnell, C.J., speaking in the early part of the reign of Hen. 8, is reported to have said, "A lease at will must be at the will of both parties; for, if it be at the will of the lessor only, it is a lease for life:" see 7 M. & G. 46, n. But we can find no instance of a lease at the will of the lessor which is not also a lease at the will of the lessee, and therefore a lease at will. And Lord Coke, in Co. Litt. 55, a, says that a lease cannot be at the will of the lessor only. So, a lease at the will of the lessee is also at the will of the lessor: Ib. But here again some qualification is necessary; for, it is laid down that, "If I make a lease to another till I go to Westminster, the lessee has an estate for life: So, if A. leases to B. till A. makes J. S. bailiff of his manor, B. has the freehold in him; for, since there is no particular time specified, but it is left indefinitely when I shall go to Westminster or J. S. be made bailiff of the manor, and these contingencies may or may not happen during the life of the lessee, and the livery transfers the freehold to him; as he must consequently by the words of the gift enjoy it during his life if none of these contingencies happen in that time upon which the estate is to determine." In such a case as this the granting of livery of seisin, or the omission to grant livery, would shew at once what was the estate of the grantee. If livery was granted, an estate for life would be created; otherwise, not.

(1) Law Rep. 7 C. P. 209.

Excluding such cases as these, and excluding cases where the intention of the parties can be ascertained, the distinction between a freehold estate determinable at will and an estate at will appears to turn upon the person at whose will the estate is held. If that person is the grantor, his heirs or assigns, the estate is an estate at will; whilst, if that person is a stranger, the estate is a freehold determinable.

In the present case, the equitable interest of the appellant in the land, as distinguished from the money arising from its sale, is determinable at the will of the trustees, who are the devisees of the testator. They have the legal estate, and are not strangers in the sense we understand that word to be used in the above extract from Serjeant Manning's note: moreover, it is their duty to sell, and so determine the appellant's interest in the land. These circumstances render the appellant's equitable interest in the land much more like an equitable estate at will than an equitable estate for life or lives, or other larger interest, as required by the statute in order to entitle him to be registered as a voter for the county.

The same conclusion may be arrived at by another mode of reasoning. It is plain that the appellant has no equitable estate or interest of inheritance in the land. In the event of his death, such interest as he has devolves as personal estate upon his executors or administrators; nothing descends to his heir. If the appellant has any freehold interest in the land, it must therefore be something less than an estate of inheritance; it must be an estate for some life or lives. No such estate is expressly given him by the testator; nor was any such estate ever contemplated by him: quite the contrary: he intended the sale to be immediate; and we do not see upon what principle an estate for life or lives can be implied, when it is not necessary to give effect to the will, under which alone the appellant derives his title.

It is curious that the precise point now before us is not apparently covered by any reported decision. But *Melling* v. *Leak* (1) goes far to shew that the appellant is not even tenant at will to the trustees, and that the appellant has no estate in the land in the proper sense of the expression. Moreover, the cases of

(1) 16 C. B. 652.

1879

SPENCER v. HARRISON.

Bennett v. *Blain* (1) and *Freeman* v. *Gainsford* (2), in which *Baxter* v. *Brown* (3) and the bearing of the equitable doctrines of conversion on rights of voting were fully discussed, appear to us to be rather in favour of the conclusion we have arrived at than opposed to it. *Baxter* v. *Brown* (3) is open to the observation that it depended on the will of the cestuis qui trustent whether there should be a sale or not. In the present case, the settlement of the daughters's share precludes the appellant from keeping the land as land, even if they wish to do so.

For the reasons we have given, we are of opinion that the decision of the revising barrister should be affirmed, and that the appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors for appellant: *Ridsdale, Craddock, & Ridsdale.*

Dec. 17.

THE MAYOR, &c. OF SWANSEA *v.* QUIRK AND ANOTHER.

Practice—Interrogatories to Corporation—Answer by Town Clerk—Solicitor—Privilege.

Interrogatories, delivered in an action against a corporation to the town clerk or other their proper officer, were answered by the town clerk, who objected to give information on the ground that it was derived from communications which had been made to him as solicitor in the action, and were therefore privileged:—

Held, that as the corporation had elected to answer through him, the objection could not be maintained.

APPEAL from Chambers.

The defendants having obtained an order allowing them to deliver interrogatories for the examination of John Thomas, the town clerk of the plaintiffs, or other their proper officer, delivered interrogatories, the answer to which was made by John Thomas, who after describing himself as town clerk of the borough of Swansea, and solicitor for the plaintiffs, said that the only information he possessed in respect of the matters upon which he was interrogated was derived (1.), from a perusal of the material documents in the defendants' possession (2.), from communications made to

(1) 15 C. B. (N.S.) 518; 33 L. J. (C.P.) 63. (2) 18 C. B. (N.S.) 185.
6 Jur. N.S. 130 (3) 7 M. & G. 190.

him as the solicitor for the plaintiffs, for the purposes of this action, and he objected to answer the interrogatories on the ground, inter alia, that the communications were privileged. On an application at chambers, Denman, J., being of opinion that the plaintiffs having elected to answer the interrogatories through their town clerk, could not set up the solicitor's privilege, ordered a further and better answer.

Fitzroy Cowper (*Brynmor Jones*, with him), for the defendants, contended that evidence obtained by the town clerk acting as solicitor in the action, was privileged. *Anderson* v. *Bank of British Columbia.* (1)

Levett, shewed cause. The corporation elected to answer the interrogatories by their town clerk and therefore cannot set up the privilege of a solicitor. The privilege, if any, is theirs. If a litigant were his own solicitor, he could not avail himself of such privilege. It is the duty of a corporation in making discovery, to use their best efforts bonâ fide to obtain all the information their agent can give them. See per James, L.J., *Anderson* v. *Bank of British Columbia.* (2) Just as directors of a company who "cannot properly answer interrogatories by saying that they know nothing about the matter, when it is in their power to obtain information from other servants of the company who may have personal knowledge of the facts; and it is perfectly clear if the information has been communicated to him from the other servants of the company, in answering interrogatories properly administered to them, they must disclose to their opponents the knowledge which they have got from that communication, even though the communication itself may be a document which is privileged." Per Cotton, L.J., in *Southwark Water Company* v. *Quick.* (3)

GROVE, J. The question is whether the town clerk, who is a solicitor, having been put forward by the corporation as their authorized officer to answer the interrogatories for them, they can avail themselves of his individuality and refuse to answer that which may be known not only to him but to every member of the corporation. Were they allowed so to refuse the consequence

(1) 2 Ch. D. 644. (2) 2 Ch. D. 644, at page 657.
(3) 3 Q. B. D. 315, at p. 321.

1879

MAYOR OF SWANSEA. v. QUIRK.

would be that if a corporation has a public officer who is also a solicitor they may, whenever sued and interrogated, set him up to answer, and, without giving their opponents information as to what the knowledge of the members or the contents of the minutes of the corporation may be, avail themselves of the solicitor's privilege to avoid answering the interrogatories. The answer in the present case is unsatisfactory in its terms. It does not allege knowledge in any member or officer of the corporation. Perhaps all but one of them know everything and that one knows nothing about the matters in question. Suppose, for instance, a new mayor unacquainted with the facts, could he be set up to answer, and the rest of the members and officers be assumed to know nothing? I think certainly not. The passages cited from the cases shew that the corporation ought to give information for the purposes of discovery and therefore should answer interrogatories by some person capable of giving it.

LOPES, J. It is said that the town clerk and solicitor ought not to be called upon to give better answers because he is the solicitor of the plaintiffs, and much if not all of his information is derived from his being their solicitor. I do not think this ground for refusing a better answer can be maintained. It must be remembered that the privilege is not that of the solicitor but of his clients the plaintiffs. I cannot think that the plaintiffs who elected to answer by their solicitor and put him forward as the person to give any proper discovery which the defendants may require, can, when the interrogatories are delivered be allowed to say that although he is their town clerk he is also their solicitor and therefore ought not to be called upon to answer. They must not blow hot and cold. Having elected to answer through him they have waived the privilege which might otherwise have existed.

Appeal dismissed.

Solicitors for plaintiffs: *Hacon & Turner.*
Solicitors for defendants: *Johnson & Weatheralls.*

[IN THE COURT OF APPEAL.]

1880
March 11.

THE YORKSHIRE BANKING COMPANY *v.* BEATSON AND MYCOCK. (1)
THE LEEDS AND COUNTY BANKING COMPANY *v.* BEATSON AND MYCOCK.

Partnership, Style of—Name of Individual Member—Signature to Bill of Exchange—Liability of Firm—Evidence.

Where a signature is common to an individual and a firm of which the individual is a member, a bonâ fide holder for value, without notice whose paper it is, of a bill of exchange with such signature attached, has not an option to sue either the individual or the firm. But there is a presumption that the bill was given for the firm and is binding upon it, at least, where the individual carries on no business separate from the business of the firm of which he is a member: this presumption, however, may be rebutted by proof that the bill was signed not in the name of the partnership but of the individual for his private purposes, and it is immaterial that the bonâ fide holder took the bill as the bill of the proprietors of the business carried on by the partnership whoever they might be, and not merely as the bill of the individual.

B. & M. carried on business in partnership. M. was a dormant partner, and B. was the only ostensible partner, the business being carried on in his name alone. B. entered into accommodation transactions for his private purposes, and, without the authority of M., accepted and indorsed bills of exchange in his own name only. B. in becoming party to these bills, did not intend to bind M., but he considered the bills as private transactions and signed them merely on his own behalf. The plaintiffs became bonâ fide holders for value of the bills signed by B., and took the bills as the bills of the proprietors of the business carried on by the partnership and not merely as the bills of B. Besides the business of the partnership B. was not engaged in any business:—

Held, affirming the judgment of the Common Pleas Division, that the plaintiffs could not hold M. liable upon the bills accepted and indorsed by B.

In these actions the respective plaintiffs appealed against the judgment of Denman and Lopes, JJ., in favour of the defendants. It had been agreed that the second action should abide the event of the first.

The facts of the first action will be found fully stated in the report of the judgment pronounced in the Common Pleas Division (1) and also in the judgment of this Court.

Feb. 19, 20, 21, 23. *Bompas, Q.C.*, and *J. Forbes*, for the plaintiffs.

Waddy, Q.C., and *Gainsford Bruce*, for the defendant Mycock.

(1) 4 C. P. D. 204.

1880

YORKSHIRE BANKING COMPANY. v. BEATSON.

The arguments in this court are sufficiently stated in the judgment hereinafter set forth. The following authorities were referred to: *Sutton* v. *Gregory* (1); *Ex parte Buckley, in re Clarke* (2); *Lloyd* v. *Ashby* (3); *Smith* v. *Craven* (4); *Ex parte Law, In re Bayley* (5); *Woodward* v. *Winship* (6); *Palmer* v. *Stephens.* (7)

Cur. adv. vult.

March 11. The judgment of the Court (Bramwell, Baggallay, and Thesiger, L.JJ.) was delivered by

THESIGER, L.J. This is an action brought upon two bills of exchange of which the plaintiffs are the holders. The first is a bill for 276*l.* 15*s.*, dated the 6th of March, 1878, drawn by R. R. Kelly & Co. upon and accepted by Messrs. J. & R. Wilson, payable to the order of the drawers four months after date, and bearing the successive indorsements, "R. R. Kelly & Co.," "Wm. Beatson," and "Josiah Carr & Son:" the second is a bill for 484*l.* 13*s.*, dated the 13th March, 1878, drawn by Josiah Carr & Son, addressed, "Mr. William Beatson, Chemical Works, Rotherham," and accepted in the name "William Beatson," payable to the order of the drawers four months after date and indorsed by them. Both bills were discounted by the plaintiffs upon the 14th of March, 1878. The defendants to the action are Wm. Beatson and John Henry Mycock. The signature "Wm. Beatson" upon each of the bills was the signature of the defendant, Wm. Beatson. He has allowed judgment to go by default, and the action is defended by Mycock alone, who disputes his liability upon either of the bills.

The circumstances of the case are as follows:—Beatson, for many years prior to December, 1877, carried on business as a chemical manufacturer at certain works at Rotherham. At the end of the year 1873 and beginning of the year 1874, the plaintiffs made inquiries as to Beatson's commercial position of Josiah Carr, who was bringing them paper for discount with Beatson's name

(1) Peake Add. Ca. 150.
(2) 14 M. & W. 469.
(3) 2 B. & Ad. 23.
(4) 1 C. & J. 500.
(5) 3 Deac. 541.
(6) 12 Pickering (Mass.) 430.
(7) 1 Denio (New York) 471.

upon it, and, the result of the inquiries being satisfactory, they discounted such paper. Beatson and Carr had some trade transactions together, but apart from these trade transactions there was a series of accommodation transactions carried out by accommodation bills between Beatson and the other parties to the bills now sued upon, including Carr himself, and these accommodation bills were from time to time renewed.

Down to the end of the year 1877, Beatson had no partner; but upon the 11th of December in that year, a deed of partnership was entered into between him and the defendant Mycock. By its terms the partnership was to last for a period of five years with power of continuance, the value of the goodwill of the business, the works and premises where the same was carried on, and the machinery, plant, and effects belonging to it, was estimated at 25,000*l.*, and Mycock was to purchase a one-fifth share of the business by the payment of the sum of 5000*l.* The business was to be carried on under the style of "William Beatson," the works and premises were to remain vested in Beatson who was to stand possessed of them for the purposes of the partnership, and the business was to be managed by Beatson, his partner not being required to attend to the business any further than he should think fit. By the 11th clause of the deed it was provided that neither of the partners, without the written consent of the other first obtained, should on the credit of the firm, make any payment, advance, or other application of the money or effects of the said partnership or in any manner engage or use the same, or the name or credit of the partnership firm, except on account and for the benefit of the partnership and in the usual manner of carrying on the business; and by the 12th clause it was provided that neither of the partners should lend or deliver upon credit any of the moneys or effects belonging to the partnership to any person whom the other partner should previously have forbidden to be trusted, nor without the previous consent in writing of the other partner would become bail, surety, or security with or for any person whomsoever, or make, give, draw, accept, or indorse any bond, bill, promissory note, or other instrument, or enter into any obligation or engagement or make any default, whereby the estate and effects of the partnership might be made liable for the

1880

YORKSHIRE BANKING COMPANY v. BEATSON.

payment or satisfaction of any sum of money, for which the partnership should not have received a full and sufficient consideration.

The object, with which Mycock entered into this partnership, was that of ultimately putting his son, who was then under age, into it, and, as a matter of fact, Mycock never interfered in any way with the management of the business, or occupied any other position or connection with it, than that of a dormant partner. Beatson concealed from him all information relating to his accommodation transactions, and for his frauds upon him in this and other matters connected with the inception of the partnership was ultimately prosecuted and convicted. The plaintiffs never knew of the partnership until July, 1878, at which date Beatson was a bankrupt.

For some time prior to the formation of the partnership Beatson had kept an account at the Sheffield and Rotherham Bank headed "William Beatson," and after the formation of the partnership that account was continued without any change in its heading, and into that account Beatson paid all moneys, whether moneys belonging to the partnership or his own private moneys, and upon it he drew, whether for the purposes of the business or his own private purposes. Beatson himself was called as a witness for the plaintiffs, and in addition to proving the facts already mentioned gave evidence to the effect that he kept two cash books, of which one was as he stated a private book kept as manager at the place of business, the other a partnership cash book; that in the former he did not enter cash received on account of the partnership, but that in the latter all business payments were entered. With reference to his bill accommodation transactions generally he stated that none of them were brought into the ledger either before the partnership or after, that the cash transactions relating to these accommodation bills were entered in the private cash book to which Mycock had no access, and were never put into the partnership cash book to which Mycock might have had access. With reference to his particular transactions with Josiah Carr he stated that all trade transactions between them were over before the partnership, and that as regards the particular bills sued on they were bills drawn for his and Carr's accommodation not for Mycock's, although he added that they were in a degree for the business as

one way of finding capital, and that without the bill transactions there was not capital enough to work the business. He admitted that Mycock found the 5000*l.* which he was to pay for his share in the business, that he never told Mycock that money was wanted, that he thought that he was not making Mycock liable for any of the accommodation bills whether renewals or otherwise, and that he considered them private transactions and did not enter them in the partnership books. He further said that he considered the bank book private, and that Mycock had left him to keep the banking account as he thought proper; that the proceeds of the accommodation bills were paid into the banking account, and that out of such proceeds goods supplied to the business and wages were sometimes paid. As regards the proceeds of the bills sued on, it appeared that a portion of them found their way into the banking account, but that upon the same day when this occurred Beatson drew out more than he paid in. On the part of Mycock an accountant was called who upon an examination of Beatson's books proved that apart from the accommodation bill transactions the business had during the period between the beginning of January and the end of May, 1878, a cash balance to its credit, that the net result of the accommodation bills was to reduce the balance, and that Beatson had drawn out for his own purposes, independent of the business, about 4000*l.*

Upon these facts taken from the notes of Lindley, J., before whom with a jury the case was tried, that learned judge stated to the jury that the questions for them were, first: "Was the name (Wm. Beatson) put to the bills to denote the firm or to denote William Beatson?" Secondly, "Did the bank take the bills as the bills of the chemical works whoever the proprietors might be or as the bills of William Beatson only?" The jury retired and returning into court the foreman stated that as regards the bill for 484*l.* 13*s.*, it having been drawn upon William Beatson at the Chemical Works, Rotherham, the jury agreed that William Beatson's acceptance of it must be held to denote the acceptance of the firm, but that as regards the other bill they found no evidence upon the point. Upon being asked by the learned judge to answer the question as regards that bill according to their judgment, the jury conferred again, and subsequently stated that

1880

YORKSHIRE BANKING COMPANY v. BEATSON.

from the fact of that bill being put in connection with the other they might take it as being the same thing, and to the second question they answered that the bank took the bills as the bills of the chemical works. Upon these findings a verdict and judgment was entered for the plaintiffs against the defendant Mycock. That judgment was subsequently set aside and judgment entered for Mycock by the Common Pleas Division, upon the ground stated shortly that in a case where the name of an individual is the name also of a firm, and that name is put to a bill, the presumption is that the signature is the signature of the individual and not of the firm; that consequently it lay upon the plaintiffs in this case to displace the presumption by shewing the signature to the bills sued upon were respectively the signatures of the firm, and that Beatson was authorized to use the firm's name on the particular occasions and for the particular purposes, in other words, that the bills were given for partnership objects and as partnership acts, and that the plaintiffs had failed to discharge the burden cast upon them. (1) Against the judgment of the Common Pleas Division the present appeal is brought.

In support of the appeal it is contended for the plaintiffs either, first, that where as in this case a signature is common to an individual and a firm, of which the individual is a member, it is open to the bonâ fide holder for value, without notice whose paper it is, of a bill with such signature upon it to sue either the individual or the firm; or, secondly, that if this option is not open to the holder, there is a presumption that the bill was given for the firm and is binding upon it, at least, where the individual carries on no business separate from the business of the firm of which he is a member.

As regards the first of these two contentions, we think that it is not a well-founded one. The only authoritative sanction to it, upon which the learned counsel for the plaintiffs rely, is a case of *McNair* v. *Fleming* which appears to have been decided in the House of Lords in 1812, but which is not reported otherwise than in Montagu on Partnership, vol. i. p. 37, and in the opinion of Lord Eldon, C., delivered in the House of Lords in the case of *Davison* v. *Robertson* (2), and which without further knowledge of

(1) 4 C. P. D. 204, at p. 212. (2) 3 Dow. 218, at p. 229.

the facts of the case, and the exact bearing of the judgment upon it, it is impossible to treat as an authority. Lord Eldon, indeed, does not quote it in support of so wide a proposition as that under consideration, but as bearing upon the proposition, that a joint adventure was as proper a partnership as any other, and one of the adventurers would be bound by the indorsement and acceptance of the other, a proposition which had been negatived by one of the interlocutors of the Scotch Court finding that, whatever might be the case in a proper partnership, one person concerned in a joint adventure is not entitled by subscribing a firm to bind the other. While therefore there is really no authoritative sanction for this contention, there is abundance of authority against it in the numerous cases in the English and American Courts, where the liability of partners upon a bill, signed in a name common to the firm and an individual member of it, has come under consideration and has been discussed, not upon the footing of any right of election on the part of the holder of the bill, but upon the particular circumstances of each case and the presumptions applicable to them, cases which we shall have to refer to more in detail in connection with the plaintiff's second contention. Apart too from authority, it appears to us manifestly contrary to true principles of law that the holder of a bill bearing upon it a name, which primâ facie indicates an individual, and would naturally lead to credit being given to the individual alone, should, upon discovery and proof that there is a firm of which the individual is a member carrying on business under his name, have the right of going against the firm, although at the same time that the proof is given, it is proved also that the bill was signed by the individual for himself and not for his firm, and for considerations entirely unconnected with any partnership purpose.

The second contention made on behalf of the plaintiffs is one of more weight, and apart from the intrinsic importance of the question involved in it, there is an additional importance derived from the fact that, if the contention be correct, it at least displaces the ground upon which the judgment of the Court below rests, although it will still remain to be considered whether the judgments may or not be rested upon another ground. As a matter of principle, there is considerable force in the arguments both for

1880

YORKSHIRE BANKING COMPANY v. BEATSON.

and against the contention. Against it it is said that when a signature to a bill is of a name, which in itself and primâ facie indicates an individual and would lead to credit being given to the individual, and the holder of the bill suing upon it is therefore compelled to give some proof that the name indicates a partnership, it is but just that he should be compelled to go the whole length of proving not only that a partnership existed under the particular name, and that the individual carried on no business separate from that carried on by the firm, but further that the bill was signed by the individual as a partnership act and for partnership objects. In support of the contention it is said that, inasmuch as a bill of exchange is ordinarily used as a trade instrument, there is a presumption that a bill having upon it a name common to the firm and to the individual is a trade bill, and therefore the bill of the firm, in a case where it is proved or admitted that there is no trading in the name except by the firm. In the absence of authority upon this question our opinion upon it would be in favour of the plaintiffs' contention. In point of convenience and expediency, and in the interests of trade, it has much to support it. The vast majority of bills given under the circumstances supposed would be really partnership bills, and yet it would be often difficult, if not impossible, for the holders of such bills to do more than prove that the only trade carried on under the individual name was the trade of a partnership, and if they were compelled to go further and prove that the particular bill was a partnership bill, the effect might be that in many cases dormant partners, and in some cases ostensible ones too, might escape from just liabilities. On the other hand the partners sought to be made responsible on the bills would in most instances be able to prove whether any particular bill sued on was or was not a partnership bill, and should, as it appears to us, at least have the onus of doing so thrown upon them when it is through their own act, in allowing the firm name to be the same as that of an individual in the firm, that difficulty and doubt arise.

But in the Court below it was considered that the American authorities clearly negative this view, and that the weight of English authorities is in favour of the American view of the law.

We propose to consider first the English authorities.

In *Swan* v. *Steele* (1) two persons of the names of Wood and Payne were wholesale grocers in Liverpool trading under the firm of Wood & Payne, and also carried on under the same firm and at their counting house the business of buying and selling cotton. The defendant Steele was a dormant partner with them in the latter business. It was held that he was liable upon an indorsement in the firm name of a bill which had been paid to Wood & Payne for cotton sold by the firm, but which had been delivered by them to provide for an acceptance in the firm name for sugar supplied to the grocery business. It is difficult to see how the case could have been otherwise decided, for the bill sued upon was admittedly a bill in which Steele was interested as indorsee and holder with his partners, and consequently the indorsement over of that bill, although improper under the circumstances, was still manifestly an indorsement in fact by the partnership, of which Steele was a member. The evidence shewed what the facts were, and the judgment of Lord Ellenborough assumed that the indorsement was in the name of the partnership of which Steele was a member, and upon that assumption decided that, in the absence of all fraud on the part of the indorsee, such indorsement would bind all the partners. *Emly* v. *Lye* (2), which is commented on in the judgment of the Court below as an authority in favour of the defendant upon the point under consideration, has really no bearing upon it. There, in an action upon several bills of exchange and for money had and received it was attempted to make the defendant liable either upon the bills or in respect of the money received upon the discount of the bills, which was applied to partnership purposes, where the signature upon the bills was not in the firm name, which was George Lye & Son, but in the name of E. L. Lye, which was the individual name of the partner signing. The counts upon the bills were upon the argument abandoned, as it was obvious, as Lord Ellenborough said in his judgment, that "on a bill of exchange drawn by one only it cannot be allowed to supply by intendment the names of others in order to charge them;" and it was held that, on the mere discount of the bill, no right could arise against the defendant by reason of the proceeds being used for partnership purposes; in

(1) 7 East, 210. (2) 15 East, 7.

1880

YORKSHIRE BANKING COMPANY v. BEATSON.

other words, that the transaction was nothing more than a purchase of the bills from the signing partner. The case of *Ex parte Bolitho* (1) is claimed as authority for the defendant. There Peter Blackburn was a secret partner in a business carried on by Isaac Blackburn in his own name, and was sought to be made liable as drawer in respect of bills drawn in the name of Isaac Blackburn by Isaac himself. Upon the affidavits it appeared that Peter Blackburn also carried on a separate business, and that after Isaac Blackburn had drawn and indorsed the bills, Peter Blackburn indorsed them also with his own hand for the purpose of getting them discounted. The Lord Chancellor stated that it was impossible for him upon the affidavits to decide between the parties, and that the case must be sent to a court of law for its determination, and he directed an issue whether the two Blackburns were jointly liable upon all or any of the bills. In the course of his judgment, however, he said: "If money is advanced to A. and B., and the lender takes a bill from one of them only, he cannot maintain an action upon the bill against the two. Now, if A. and B. are partners and also separate traders, and A. draws a bill and indorses it in his own name, and B. also indorses it, and they become bankrupts, what is there to prevent the holder of a bill from proving against the separate estate of each of them? And unless you can shew that when A. drew the bill he drew it not as A., but as A. and B., there can be no legal contract upon the bill as against the two." In these remarks of Lord Eldon the introduction of the element of separate trading by A. and B., and of the further element of both A. and B. putting their names to the bills so differs Lord Eldon's supposed case from the case we are considering of a bill signed in a name common to a firm and an individual member of the firm, where there is no trading separate from the trading of the firm, and no signature to the bill but that of the common name, that *Ex parte Bolitho* (1) appears to us rather to support the contention of the plaintiffs' counsel than to assist the defendant Mycock. The case of the *Bank of South Carolina* v. *Case* (2) was one in which three persons carried on business in partnership in England under the firm name of Crowder, Clough, & Co. One of the partners, J. B. Clough, was

(1) 1 Buck's B. C. 100.

(2) 8 B. & C 427.

sent out to America to form a branch house, which he did form under his own individual name. He was restricted under the partnership articles from transacting any business in America, except on the partnership account, and, as a matter of fact, as appears from the report, p. 432, he had no individual business, and the name of J. B. Clough was never used by him in trade or in drawing, indorsing, or accepting or negotiating bills of exchange, except for the benefit and on account of the partnership. Under these circumstances it was held that all the partners were liable as indorsees in respect of certain bills indorsed by Clough in the name of J. B. Clough, and which were connected with partnership transactions, although Clough in indorsing them disregarded certain specific instructions given him by his partners, and exceeded his authority. It is unnecessary to discuss whether the doubts raised by Crompton, J., in *Nicolson* v. *Ricketts* (1) as to the correctness of this decision are or are not well founded. It is sufficient for our present purpose to say that the decision proceeded upon all the facts of the case, and not upon any doctrine as to presumption or burden of proof. But the case of *Furze* v. *Sharwood* (2) is a distinct authority upon the point under consideration. There a business was carried on by trustees for creditors in the name of Samuel Maine, one of the persons who had previously carried it on in partnership. Maine had also for a time a separate business of his own. The plaintiff had discounted bills for the old partnership, and also had been accustomed to lend Maine money for the purposes of his private business. Maine after a time sold his separate business and ceased to carry it on, and having subsequently indorsed bills in the name "Samuel Maine," one of which had been discounted by the plaintiff and was sued on, and the proceeds of which were placed to his credit at his bankers, and were drawn upon indiscriminately for the purposes of the business, in which he was agent, and for his own private purposes, the trustees were held liable as indorsers, and Lord Denman, C.J., in delivering the judgment of the Court, said, p. 418: "Primâ facie, therefore, the signature 'Samuel Maine' was their signature, and they would be bound by it. But it is said that Maine carried on a separate business of his own,

(1) 2 E. & E. 497; 29 L. J. (Q.B.) 55. (2) 2 Q. B. 388.

1880

YORKSHIRE BANKING COMPANY v. BEATSON.

and that the plaintiff was bound to shew that the indorsements in question were on account of the business of the trustees, and not in his separate business. Now, it appears that the bills were discounted with persons who were in the habit of discounting for the former firm, who assigned their effects to the defendants as trustees; and, moreover, that the bills in question were not discounted till after Maine had ceased to carry on his separate business. Under these circumstances we think that the onus of shewing that the indorsements were made on account of the separate business, and not on that of the trustees, which was the general and ostensible business, lay on the defendants. Several cases were cited which it is not necessary minutely to examine; it is sufficient to say that they are not inconsistent with this view of the present case. We are, therefore of opinion that the defendants were bound by the indorsement of Maine, and that the plaintiff, on this ground of objection, would be entitled to our judgment." This decision is in no way shaken by that in *Nicholson* v. *Ricketts* (1), where two firms with distinct trade names agreed to carry on joint exchange operations under such circumstances as to make them partners in them, and it was held that the signature to bills of one of the two firms drawn in the course of the exchange operations did not make both firms liable as drawers; for the decision proceeded simply on the ground that by the arrangements between the two firms the names of the two firms were to be used separately, the paper to be dealt in being drawn by one firm and accepted by the other (2); and, as Cockburn, C.J., said at p. 523, it did not appear that the drawing firm had any authority, express or implied, to bind the defendants by drawing bills. The case of *In re Adansonia Fibre Co., Miles's Claim* (3) was substantantially the same as that of *Nicholson* v. *Ricketts* (1), and was decided upon the same considerations. In each of these cases the Court came to the conclusion, as a matter of fact, upon all the circumstances before it, that the name on the bill was not intended to be, and was not, the name of the partnership sought to be made liable upon it.

Upon this review of English authorities they appear to support

(1) 2 E. & E. 497; 29 L. J. (Q.B.) 55. (2) Per Crompton, J., 527.
(3) Law Rep. 9 Ch. 635.

the view that where a name is common to a firm and to an individual member of such firm and the individual member carries on no business separate from that of the firm, there is a presumption that a bill of exchange drawn, accepted, or indorsed, in the common name is a bill drawn, accepted, or indorsed, for the partnership and for which the partnership is liable, and that it lies upon the defendants in an action against the partners upon such bill to get rid of the primâ facie case made against them. But, as the Court below relies much upon the American authorities as uniformly negativing this view, and those authorities have been much discussed in the argument before this Court, we think it desirable to refer to them.

The authorities specially cited in the judgment of the Court below are Parsons on Bills of Exchange, p. 131 ; Story on Partnership, pp. 106, 142; the decision in the Supreme Court of New York of *Oliphant* v. *Mathews* (1); and the direction of Story, J., to the jury in *United States Bank* v. *Binney*. (2) The passage referred to in Parsons does not bear out the proposition for which it is cited. He says, "The burden of proof is upon the plaintiff to shew that the paper was given in the business and for the use of the firm ; for it will be intended primâ facie to have been given in the separate business of the partner signing it and to be binding upon him alone, *at least if he is also engaged in business on his own separate account*." The views of Story, J., are best to be taken from his ruling in *United States Bank* v. *Binney*. (2) There in directing the jury he used this language : "In the present case the signature of John Winship may be on his own individual account as his personal contract, or it may be on account of the partnership. Upon the face of the paper it stands indifferent. The burden of proof then is upon the plaintiffs to establish that it is a contract of the firm and ought to bind them." But there was evidence to go to the jury in that case, that the partnership was limited to a soap and candle business, and that the accommodation notes which were sued on were given in respect of consignments of meat, which might have constituted, and it was contended, did constitute the separate business of Winship. It is doubtful, therefore, whether Story, J., intended his proposition to extend to

(1) 16 Barbour, 608. (2) 5 Mason 176, 184.

1880

YORKSHIRE BANKING COMPANY v. BEATSON.

a case where no separate business could even be suggested as existing. On the other hand, in the case of *Mifflin* v. *Smith* (1), Rogers, J., dealt with the doctrine of presumption in a case where the question was whether a loan of money, obtained by a member of a partnership carried on in his individual name, was obtained on the faith of the partnership business or on the credit of private speculations of the individual partner, and he laid it down that the presumption was that it was made on the faith and credit of the business, saying, "If a retail merchant gets a note discounted, is it not to be presumed to be in the regular prosecution of his business?" and adding, "The difficulty arises from the name of the individual and the name of the firm being the same. That is the presumption, liable, however, to be rebutted if the jury believe from the evidence that was not the state of the fact." A motion to the Supreme Court of Pennsylvania, founded amongst other things upon the alleged errors of this direction, was refused. This case was decided in 1828. The case before Story, J., was in 1828. In 1845 the question under consideration again arose in the Supreme Court of New York in the case of the *Bank of Rochester* v. *Monteath* (2), where the name of William Monteath, an agent of a firm, had been used as the firm name, and the Court said: "If William Monteath had also been in business on his own account, then the acceptance by writing his name on the face of the bills would have been an equivocal act, and it would have been necessary to shew that he accepted on account of the partnership and not in his own private business:" and after citing among the authorities for this proposition the *United States Bank* v. *Binney* (3), thus indicating that they must have thought that in that case there was a separate business carried on by the individual whose name was used, the Court added: "But there was no evidence that William Monteath was engaged in any other business than the affairs of this partnership. We must then regard these bills as drawn on and accepted by the house doing business in the name of William Monteath." In 1853 was decided, also in the Supreme Court of New York, the case of *Oliphant* v. *Mathews* (4),

(1) 17 Serjeant & Rawle (Pennsylvania) 165.

(2) 1 Denio, 402.

(3) 5 Mason, 176.

(4) 16 Barbour, 608.

which is the second of the two cases cited in the judgment of the Court below. That case, when critically examined, will be found not to be inconsistent with the cases of *Mifflin* v. *Smith* (1) and the *Bank of Rochester* v. *Monteath*. (2) It is true that the Court laid down in general terms that where a partnership is carried on in the name of an individual, and a suit is brought against the partners upon a note or other obligation signed by such individual, the legal presumption is that it is the note of the individual and not of the partners; but the Court immediately qualified the generality of the proposition laid down, by saying that the presumption might be repelled and overcome (in other words the onus of proof might be shifted) by proof as to the business in which such person was engaged, and while citing *Mifflin* v. *Smith* (1), as explaining what proof would be sufficient, the Court pointed out that in the case before them it was proved that the individual did business and borrowed money on his own account as well as on account of the partnership, and it was not shewn that one was not constant and regular as the other. This case, therefore, is in no way inconsistent with the previous case decided in the same court of the *Bank of Rochester* v. *Monteath* (2), and none of the other cases cited in the argument before us carry the doctrine of presumption in favour of the defendant further. It appears to us, therefore, that the American authorities are in accord with the English upon the point under consideration, and that both fail to support the view taken by the Court below, and are in favour of the second contention urged in this case on behalf of the plaintiffs.

Applying then the presumption for which the plaintiffs contend to the circumstances of the present case, the matter stands thus. The only business carried on in the year 1878 in the name of and by William Beatson was the business of the partnership, and both the bills sued upon have the appearance of trade bills. Primâ facie, then, the bills were bills indorsed and accepted respectively in the name and on account of the partnership; and if that primâ facie case were not displaced, Mycock would be liable upon them to the plaintiffs as bonâ fide holders for value without notice, even though they were so indorsed and accepted for private purposes of

(1) 17 Serjeant & Rawle (Pennsylvania) 165. (2) 1 Denio, 402.

1880

YORKSHIRE BANKING COMPANY v. BEATSON.

Beatson and in fraud of his partner. The nature of the partnership business was such as to give Beatson in respect to persons dealing with him in business an implied authority to bind his partner by bills of exchange, and his partner, although a secret one, must be held responsible upon any bill signed by Beatson in the name of the firm in favour of a holder whose title cannot be impeached, however much Beatson in signing that name may have exceeded the authority and broken the trust reposed in him by the agreement of partnership. As was said by the Court in giving judgment in the case of *Wintle* v. *Crowther* (1), "Where a partnership name is pledged, the partnership, of whomsoever it may consist, and whether the partners are named or not, and whether they are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached," and the authorities generally both English and American are uniform in support of this view. There is no difference in this respect between the dormant and the ostensible partner, and when once it is established that a name common to a firm and an individual member of it has been put to a bill as the name of the firm, there is no difference between the liability of partners carrying on business in such a name and the liability of partners carrying on business in a name which bears in itself the stamp and evidence of a partnership. It may perhaps be argued that in the latter case the bonâ fide holder without notice is induced by the name itself to trust a firm, and is therefore entitled to have the responsibility of all the members of that firm, while an individual name would suggest no responsibility other than that of the individual whose name it is; but when it is remembered that firm names are often used by individual traders while individual names are often used by firms, the argument practically comes to nothing, and a common principle applicable to both cases remains alone consistent with mercantile expediency and general law.

But assuming that there is no difference as matter of law between the two cases, there is as a matter of evidence a very real and very practical difference. A name in itself indicating a firm does not, except in rare instances of which the case of *Stephens* v. *Reynolds* (2) is an example, leave open any doubt as

(1) 1 C. & J. 316, at p. 318. (2) 5 H. & N. 513.

to the meaning of a signature in such name; but a name which in itself indicates an individual is, notwithstanding the effect of any legal presumption, ambiguous, and there are likely to be few if any cases where the decision of the jury or of a Court will be rested upon the presumption alone. The present case is no exception to the rule, and the presumption in favour of the plaintiffs arising from the fact, that Beatson carried on no business separate from that of the partnership, sinks into comparative insignificance by the side of the additional facts which are proved in the case. Upon those facts we have to decide, as the Courts in *Nicholson* v. *Ricketts* (1), and *In re Adansonia Fibre Co., Miles's Case* (2), were called upon to decide, whether the signature to the bills, upon which the dispute arises, was intended to denote and did denote the partnership of which the defendant was a member. In the first place, it is clear that the bills were bills which, if signed by Beatson for the partnership, were so signed by him without the authority and in fraud of his partner, and in respect of which no action would have lain against Mycock if they had remained in the hands of Josiah Carr & Son, who took them with notice. In the second place it is, we think, equally clear that as between Beatson and Mycock the bills were not treated as having been signed by Beatson on partnership account. They were not entered in any partnership book; and indeed, even before the partnership as well as after it commenced, the accommodation transactions of Beatson were treated as not forming any part of the transactions of his business, and were excluded from the ledger. In the third place, the evidence establishes that the accommodation transactions of Beatson, after the commencement of the partnership, diminished rather than added anything even temporarily to the capital of the firm; and lastly, Beatson himself, called as a witness by the plaintiffs themselves, disproved, as it appears to us, the fact that in signing the bills in question he signed for the partnership. He stated that he thought he was not making Mycock liable for any of the accommodation bills whether renewals or otherwise, and that he considered them private transactions, and did not enter them in the partnership books. Can any inference be reasonably drawn from such evidence

(1) 2 E. & E. 497. (2) Law Rep. 9 Ch. 635.

1880

YORKSHIRE BANKING COMPANY v. BEATSON.

than that Beatson in signing the bills intended to sign and did sign them for himself? We think that no other inference ought to be drawn, and that the jury in finding that the signature "William Beatson" upon each of the bills was intended to denote the firm, gave a verdict against the evidence and one which ought not to stand. The reason given in support of their finding by the jury, that the one bill was addressed to the drawee or drawees as of the Chemical Works, Rotherham, and that the other was so connected with it as to stand or fall with it, might have been a good reason in a case where the evidence was in other respects doubtful, but is in the present case met to some extent by the very form of the bill itself, which, while addressed to the drawee or drawees at the partnership works, contains in the term "Mister," prefixed to the name Wm. Beatson, an indication that the individual and not the firm was intended, and is entirely outweighed by the clear evidence to which we have referred; and we understand that the learned judge who tried the case was himself dissatisfied with the finding. The additional finding that the bank took the bills as the bills of the chemical works is clearly irrelevant, if the former finding is wrong; for, if the bills were in fact signed not in the name of the partnership but of William Beatson individually and for his private purposes, the fact that the plaintiffs, who were unaware that Mycock was a partner with Beatson, and never advanced any money on the faith of his credit, did at the same time give credit to the name of Beatson as being the name of the owner of the chemical works, can give them no more right against Mycock than if he had been a mortgagee of the works instead of a partner in them. The law by express enactment in the case of bankruptcy asserts a title in favour of the general body of creditors of a bankrupt to property, of which he may have been at the time of his bankruptcy in apparent possession with the consent of the true owner, and upon the faith of which he gained a false credit. But in actions founded upon purely personal contracts, the law does not recognise the mere moral right which a creditor may attempt to assert against one person in consequence of his having intrusted to another property, in the belief of his ownership of which the creditor may have contracted with him; in other words, in a case like the present

there is no conduct on the part of the dormant partner which makes it inequitable on his part to deny or estops him from denying his liability upon a contract to which he was in fact no party, from which he has derived no benefit, and in respect of which he was not held out to the person suing him as liable. As regards this point nothing turns on the subject-matter of the action being negotiable instruments. Beatson by giving the use of his name to a partnership, of which he was a member and the only ostensible member, did not preclude himself from making contracts binding himself alone, and in any contract de facto made by him whether by parol or in writing the question, the answer to which would determine Mycock's liability or freedom from liability, would not be whether the other contracting party trusted Beatson because he supposed him to be sole owner of the chemical works, but whether Beatson, whom alone he knew and actually trusted, was acting as agent for the partnership or in his individual capacity for himself. This kind of question was raised in the case of the *Bank of Scotland* v. *Watson* (1), where the bank and its agent carried on separate banking businesses at the same office, and the bank was unsuccessfully sued by a person who relied, in support of his claim against the bank, upon a receipt which bore the address of the common office.

One point only remains for decision. The verdict and judgment for the plaintiffs have been properly set aside by the Court below, but is it right that the judgment entered instead for the defendant Mycock should stand? We have entertained some doubt whether the case ought not to go to another jury to be decided upon the principles laid down in this judgment, but we have come to the conclusion that the Court ought not to put the parties to this expense. The case is one in which no additional facts remain to be proved, and in which upon the facts proved no jury would be justified in finding a verdict adverse to the defendant Mycock. It is one, therefore, in which, to use the words of Rule 10 of Order XL. of the General Rules of the Supreme Court, we have before us, as the Court below had, all the materials necessary for finally determining the question in dispute; and in this state of circumstances we think that the judgment of the Court

(1) 1 Dow. 40.

1880

YORKSHIRE BANKING COMPANY v. BEATSON.

below should stand, and that the appeal should consequently be dismissed.

Judgment affirmed.

Solicitors for plaintiffs: *Jacobs & Vincent.*
Solicitors for defendants: *Learoyd & Co.*

March 19.

[IN THE COURT OF APPEAL.]

DAVIS *v.* GOODMAN AND ANOTHER.

Bill of Sale—Attestation by Solicitor—Void as between Grantor and Grantee—41 & 42 Vict. c. 31.

5 CLD 48 — 5 — 6 QBD 660 — 662-46-7 — 7 QBD 517 — 526-1 — 20 CLD 218 — 9 QBD 138 — 141 — 23 CLD 694-2

A bill of sale to which the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), applies, if it be not explained to the grantor and attested by a solicitor in compliance with ss. 8 and 10, is not void as between the grantor and grantee:—So *held*, overruling the judgment of the Common Pleas Division.

APPEAL from the judgment of the Common Pleas Division in favour of the defendants. (1)

Gore, for the plaintiff.

Bompas, Q.C., for the defendants.

The arguments were the same as in the Court below.

BRAMWELL, L.J. I think that this appeal must be allowed. The statute must be read as if s. 8 included s. 10, then it is clear that the consequences mentioned in s. 8 are the only consequences which would follow from the bill of sale not being attested by a solicitor. The provisions mentioned in s. 10 are not for the sole benefit of the grantor; they are inserted for the benefit of the general creditors, for no solicitor would attest a bill of sale unless the facts were true and the transaction was bonâ fide; and if he explained the deed to the debtor, he would know whether he was committing a wrong against the general body of the creditors. The solicitor also being known is a guarantee as to the genuineness of the transaction. If, however, s. 10 was intended for the benefit of the grantor, inasmuch as the legislature have not attached a consequence to the nonfulfiment of its stipulations, the bill of sale is not void against the grantor.

(1) Ante, p. 20.

BAGGALLAY, L.J, concurred.

THESIGER, L.J. I am of the same opinion. The object of the new and the old Act is the same. By s. 8 of the new Act every bill of sale shall be attested; it shall be registered, and it shall set forth the consideration. Following upon these three directions certain results are to take effect. The words "otherwise such bill of sale as against all trustees or assignees of the estate of the person whose chattels are comprised in such bill of sale, or under any assignment for the benefit of the creditors of such person, and also as against all sheriff's officers, &c., shall be deemed fraudulent and void," govern all the three limbs of the previous part of the section. The word "shall" is repeated not only before "registered" but also before the words "set forth," so that upon the grammatical construction the clause expressly avoiding the bill if it does not apply to all the three limbs must apply to the last limb only, and would thus not apply to the enactment as to registration to which Lord Coleridge admits that it must apply. The sole result of not performing the directions contained in the first part of the section is to avoid the bill against certain specified persons, of whom the grantor is not one. Section 10 does not carry the matter further; it explains s. 8, and points out the mode in which the directions of that section are to be complied with. It must be read with s. 8. I cannot say that the creditors have no interest in having the bill of sale explained to the grantors.

Judgment reversed.

Solicitors for plaintiff: *Harper, Broad, & Battcock.*
Solicitors for defendants: *Milne, Riddle, & Mellor.*

1879
Dec. 3

[IN THE COURT OF APPEAL.]

HAYTON *v.* IRWIN.

Ship—Charterparty—To deliver at a given Port, "or so near thereto as the Ship could safely get"—Custom inconsistent with the Contract.

5 P D 158
11 Q B D 345
350

By a charterparty the vessel was to deliver at H., "or so near thereto as she could safely get;" to discharge as customary; the cargo to be brought to and taken from alongside the ship at merchant's risk and expense. The draught of water of the vessel with the cargo on board was too great to allow her to reach H. The nearest point to which she could safely get was S., where the merchant refused to accept delivery of any part of the cargo. In order to lighten the vessel, part of her cargo was discharged into lighters at S. and sent in them to H. Her owner having sued the charterer to recover the lighterage expenses:—

Held, that a defence alleging that by the custom of the port of H. the defendant was not bound to take delivery elsewhere than at H. was bad on demurrer, inasmuch as it sought to set up a custom inconsistent with the written contract, and that the plaintiff was entitled to recover the lighterage expenses.

ACTION for not taking delivery of goods pursuant to charterparty.

Claim. 1. The plaintiff is the managing owner of the *Elizabeth Ostle*, and is a partner in the firm of Hayton & Simpson, of Liverpool.

2. The defendant is a merchant carrying on business in London.

3. The plaintiff on the 10th of April, 1878, through the firm of Hayton & Simpson, chartered the *Elizabeth Ostle* to the defendant. The material parts of the charterparty were as follows:—

It is this day mutually agreed between Messrs. Hayton & Simpson, owners, &c., now on passage to Hong-Kong, on the one part, and R. W. Irwin, of London, merchant, on the other part:

1. That the said vessel, being tight, staunch, and strong, a first-class risk in the insurance offices in England, and in every way fitted for the intended voyage, after completion of present voyage and discharge of cargo, shall proceed with all possible despatch to load at any one safe port in Japan as ordered at Hong-Kong, or so near thereto as she may safely get and be always afloat, and there receive from the factors of the merchant a full and complete cargo of rice in bags, and [or] such other lawful merchandize, being measurement goods, as charterer's agents may wish, but not exceeding what she can reasonably stow and safely carry over and above her tackle, apparel, stores, cabin, and accommodation for crew as customary, and, being so loaded, shall therewith proceed to a safe port in the United Kingdom, or on the continent between Havre and Hamburg, both ports included, as ordered at Queenstown or Falmouth within forty-eight hours after receipt of telegrams or letters of advice of arrival, or so near thereto as she

can safely get, and deliver same on being paid freight at and after the rate of 52*s.* 6*d.* per ton of 20 cwt. net weight delivered of rice or other weight goods, or 50 cubic feet for measurement goods; 52*s.* 6*d.* to continent (the act of God, &c., excepted).

3. Twenty lay-days (Sundays and holidays excepted) are to be allowed the merchant, if the ship is not sooner despatched, for loading the ship, and to discharge as customary with all possible despatch; the lay-days to commence 24 hours after notice in writing of the vessel being ready to load has been given to charterer's agents.

4. Should the vessel be detained by charterer's agents over and above the said lay-days, demurrage shall be paid to the master or his order day by day, at the rate of 16*l.* per day during such detention.

5. The cargo to be brought to and taken from alongside the ship at merchant's risk and expense.

4. The *Elizabeth Ostle* was loaded by the defendant at Japan under the above charter, and was ordered to Hamburg.

5. She sailed for Hamburg; but her draught of water with the cargo on board was so great that she could not get up the river to Hamburg. Stade was as near thereto as she could safely get; and when at Stade the plaintiff, in accordance with the terms of the charter, was willing to deliver the cargo to the defendant there, or to deliver to him there so much of the cargo as would lighten the ship sufficiently to enable her to proceed up the river Elbe to Hamburg.

6. The defendant refused to take delivery of the cargo or of any part thereof at Stade, and refused to perform, and broke the charter.

7. The plaintiff, for the purpose of completing the voyage and earning freight, discharged part of the cargo into lighters at Stade, and the same was delivered from the lighters to the defendant's agent at Hamburgh. When lightened, the *Elizabeth Ostle* proceeded to Hamburg and there delivered the remainder of the cargo to the defendant's agent.

8. The lighterage expenses necessarily incurred by the plaintiff in consequence of the defendant's breach of the charterparty amounted to 38*l.* 13*s.* 5*d.* The plaintiff claimed that sum.

Defence. 5. By the custom of the port of Hamburg, the defendant was not bound to take delivery of the cargo or any part of it at Stade or elsewhere than at the port of Hamburg; nor were lighterage expenses incurred by the plaintiff for the purpose of lightening the vessel and enabling her to proceed up the river to

1879

HAYTON v. IRWIN.

Hamburg and there complete the unloading of her cargo, in the absence of special agreement, recoverable from the defendant by the plaintiff.

Demurrer to the 5th paragraph of the statement of defence, on the ground that the plaintiff's rights under the charterparty sued upon to have delivery taken at Stade, are not affected by or subject to the custom of the port of Hamburg.

Nov. 8. *French*, for the plaintiff. The custom set up by the 5th paragraph of the statement of defence is inconsistent with the written contract, and therefore not binding on the plaintiff in the absence of evidence that he was cognizant of it: in that case he might be assumed to have contracted with reference to it: *Kirchner* v. *Venus* (1); notes to *Wigglesworth* v. *Dallison* (2); 1 Smith's Leading Cases, 8th ed. 594, 602, citing the judgment of Parke, B., in *Hutton* v. *Warren* (3), which was adopted by Blackburn, J., in his judgment in *Myers* v. *Sarl.* (4) And see *Norden Steam Co.* v. *Dempsey* (5) and *Robinson* v. *Mollett.* (6)

Wilberforce, for the defendant. The custom relied upon by the defendant is not inconsistent with the contract. By the 1st paragraph of the charterparty the ship was to proceed to the port of delivery (Hamburg), "or so near thereto as she could safely get;" and by the 3rd paragraph the cargo was to be discharged "as customary." The custom of the port of Hamburg is thus incorporated in the contract. The port of delivery means the actual port, or some place within the ambit of the port where ships are usually unladen: *Schilizzi* v. *Derry* (7); *Metcalfe* v. *Britannia Ironworks Co.* (8), affirmed on appeal. (9) Whether or not the place where delivery is offered is within the port or not, must necessarily depend upon the custom of the particular port: *Hillstrom* v. *Gibson* (10); *Parker* v. *Winlow* (11); *Bastifell* v. *Lloyd* (12); 1 Parsons on Shipping, p. 237.

French, was heard in reply.

(1) 12 Moo. P. C. 361.
(2) 1 Doug. 201.
(3) 1 M. & W. 474.
(4) 3 E. & E. 306.
(5) 1 C. P. D. 654.
(6) Law Rep. 7 H. L. C. 802.
(7) 4 E. & B. 873. 1 Jur N.S. 795
(8) 1 Q. B. D. 613.
(9) 2 Q. B. D. 423.
(10) 22 L. T. (N.S.) 248.
(11) 7 E. & B. 942. 4 Jur N.S. 84
(12) 1 H. & C. 388; 31 L. J. (Ex.) 413.

1879

HAYTON v. IRWIN.

GROVE, J. I am of opinion that this demurrer must be allowed. Upon the face of the pleadings the charterparty is thus stated:—The vessel, being loaded in Japan, is to proceed to a safe port, as ordered on arrival at Queenstown or Falmouth,—say, to Hamburg,—"or so near thereto as she can safely get," and deliver her cargo on being paid freight. It is further provided that she is "to discharge as customary, with all possible despatch," and that the cargo is to be "brought to and taken from alongside the ship at merchant's risk and expense." The statement of claim alleges that the ship, being ordered to Hamburg, sailed for that place, but her draught of water with the cargo on board was so great that she could not get up the river to Hamburg; that Stade was as near thereto as she could safely get; that, when at Stade, the plaintiff, in accordance with the terms of the charter, was willing to deliver the cargo there, or so much of it as would lighten the ship sufficiently to enable her to proceed up the river to Hamburg, that the defendant refused to take delivery of the cargo or of any part thereof at Stade; that the plaintiff, for the purpose of completing the voyage and earning freight, discharged part of the cargo into lighters at Stade, and the same was delivered from the lighters to the defendant's agent at Hamburg; and that the ship when lightened proceeded to Hamburg and there delivered the remainder of the cargo, and so certain expenses were incurred. The substance of that is, that the vessel got as near to the port of delivery as she could safely get, and the plaintiff then offered to perform the contract in the only way in which he could perform it, but the defendant refused to accept delivery there. The answer set up by the defendant is, that, by the custom of the port of Hamburg, he was not bound to take delivery of the cargo or any part of it at Stade or elsewhere than at the port of Hamburg. To this there is a demurrer on the ground that the plaintiff's rights under the charterparty are not affected by the alleged custom; in other words, that the custom set up by the statement of defence is inconsistent with the terms of the charterparty. The contract is, to deliver at Hamburg or so near thereto as the ship can safely get; the custom set up is, to deliver at Hamburg, whether the ship could get there or not. I think the custom is clearly inconsistent with the contract, and cannot be allowed to control it. The

1879

HAYTON v. IRWIN.

Scotch case, *Hillstrom* v. *Gibson* (1), seemed to me at first sight to present considerable difficulty as to the ratio decidendi: but, when carefully looked at, it will be found to be by no means opposed to the view which I take: the custom there relied on was reasonably consistent with the contract. I think the demurrer must be allowed.

Judgment for the plaintiff.

The defendant appealed.

Dec. 3. *Wilberforce*, for the defendant. The custom alleged in the defence is consistent with the contract contained in the charterparty; the ship may be unloaded, either wholly or in part, at Stade, but in that case the owner must bear the expense of sending the goods up the river to Hamburg. The charterer is not bound to repay him the lighterage expenses. The freight would not have been earned if the cargo had been landed at Stade: *Metcalfe* v. *Britannia Ironworks Co.* (2); for a vessel must be unloaded according to the custom of the port of discharge: *Norden Steam Co.* v. *Dempsey* (3); the plaintiff was bound to lighten the vessel in order to bring her and her cargo to Hamburg: *Hillstrom* v. *Gibson.* (1)

French, for the plaintiff, was not called upon to argue.

PER CURIAM (Bramwell, Brett, and Cotton, L.JJ.). It is very clear that the decision of Grove, J., was right. The words of the charterparty provide that the vessel was not to go at all hazards into the port itself, and the express contract of the parties cannot be controlled by the custom. The terms of the contract exclude the custom. When the vessel reached Stade she was as near to Hamburg as she could safely get, and the defendant was bound to take at Stade delivery of her cargo until she was sufficiently lightened to enable her to proceed up the river to Hamburg; as he failed to do this, he must pay the lighterage expenses incurred by the plaintiff.

Appeal dismissed.

Solicitors for plaintiff: *Prior, Bigg, Church, & Adams, for J. B. Wilson, Liverpool.*

Solicitor for defendant: *J. McDiarmid.*

(1) 22 L. T. (N. S.) 248. (2) 2 Q. B. D. 423.
(3) 1 C. P. D. 654.

WILLIAMS *v.* THE MAYOR OF TENBY AND OTHERS.

1879
Dec. 17.

Municipal Election—Petition—Notices—Service of—Condition Precedent to Trial—35 & 36 Vict. c. 60, s. 13, sub-s. 4.

It is a condition precedent to the trial of a municipal election petition that, within five days after the presentation of it, the petitioner should in the prescribed manner serve on the respondent a notice of the presentation, and of the nature of the proposed security, and a copy of the petition as required by 35 & 36 Vict. c. 60, s. 13, sub-s. 4.

APPEAL from an order of Lopes, J., at chambers, that a municipal election petition be taken off the file on the ground, first, that no notice of the presentation of the petition and of the proposed security had been duly served on the respondent, pursuant to the 13th section, sub-s. 4 of the Municipal Elections Act, 1872, 35 & 36 Vict. c. 60; and, secondly, that no affidavit of the time and manner of the services of the notices required by the 13th section had been duly filed, pursuant to rule 2 of the Additional General Rules of January, 1875.

Sir H. Giffard, S.G. (*Biron*, with him), for the petitioner. The petition was presented in due time, viz., within twenty-one days as required by 35 & 36 Vict. c. 60, s. 13, sub-s. 2; but no notice of the service nor of the proposed security was given within five days under sub-s. 4, and therefore, of course, no affidavit of service was filed according to the Additional General Rules of the 27th of January, 1875, rule 2. The provisions of sub-s. 4 are, however, merely directory, and compliance with them is not a condition precedent to the maintenance of the petition. The time limited by sub-s. 4 can be extended.

[GROVE, J. Could the time for presenting the petition be extended?]

Probably not. The policy of the statute would strictly limit the time within which proceedings may be taken to impeach the validity of an election, that the person elected may not be kept in uncertainty as to whether they will be instituted or not. The twenty-one days is a period analogous to the periods fixed by the Statutes of Limitation. But sub-s. 4 contains less important provisions which are ancillary to the general purpose of providing a tribunal for the trial, and they are not imperative. A copy of

1879

WILLIAMS v. MAYOR OF TENBY.

the petition was published in the borough, so the respondents must have been aware of the presentation. Notice of the security is required only that the respondent may ascertain or object to its sufficiency. But security may be either by deposit of money, or by recognizance. Suppose a large sum paid into court, yet no notice given within five days, the terms of sub-s. 4 would be contravened, but could it be said that although no possible harm would result from the want of notice the petition would be defeated? The main object of the enactment is to require from the petitioner adequate security.

The learned judge at chambers had, by rule 44 of the Additional General Rules of January, 1875, the same control over the proceedings as a judge at chambers in ordinary proceedings, and therefore, under the Judicature Acts, Order LVII., rule 6, had power to enlarge the the time.

J. Cunningham, for the respondents, was not heard.

GROVE, J. I think, without doubt, that the order of Lopes, J., was right. By 35 & 36 Vict. c. 60, s. 13, certain provisions shall have effect with reference to the presentation of a petition complaining of an undue election. Of those provisions the first five only come into question here: (1.) provides that "a petition may be presented either by four or more persons." Would three suffice? I think not. "A petition shall be in the prescribed form, and shall be signed by the petitioner or petitioners, and shall be presented to the superior Court in the prescribed manner, and the prescribed officer shall send a copy thereof to the town clerk of the borough to which it relates, who shall forthwith publish it in the borough." Imperative words are usual throughout. (2.) "A petition shall be presented within twenty-one days after the day on which the election was held, unless it complain of the election on the ground of corrupt practices, and specifically allege a payment of money or other reward to have been made or promised since the election, by a person elected at the election, or on his account or with his privity, in pursuance or furtherance of such corrupt practices, in which case it may be presented at any time within twenty-eight days after the date of the alleged payment or promise." Is that directory, or a condition

precedent to the petition being entered? It seems to me to be a condition precedent, and indeed the Solicitor General admits that it is peremptory and could not be dispensed with by a judge or the Court. Then, following the provision that the petition shall be presented within a certain time, is (3.) "At the time of presenting a petition, or within three days afterwards, the petitioner shall give security for all costs. . . . . The security shall be to the amount of 500*l.*, and shall be given in the prescribed manner either by a deposit of money or by recognizance entered into by not exceeding four sureties, or partly in one way and partly in the other." The same peremptory language is used as in sub-s. 2, the subject matter is I think sufficiently parallel—for I cannot distinguish between the materiality of the time of presenting a petition and the materiality of the time of giving security—the matter seems as important to the party in the one case as in the other, and arguments quite as strong may be applied to each. The meaning of the enactment is that the petition shall not be kept long hanging over the heads of persons elected in municipal corporations. The petition must be presented in twenty-one days, and during that time the petitioners should read the Act and ascertain what they have to do. We have found great inconvenience in ordinary cases where the Court have power to extend the time, for we are much occupied with applications for extension of time, and in many cases it is most important that the time of proceeding should be limited, and that persons should know when they are safe.

It is said that the provisions as to the time within which security should be given are mere machinery. But if they are so in the case of the five days for giving security, they must be so in the case of the presentation of the petition within twenty-one days. Sub-s. 4 is in similar terms. "Within five days after the presentation of a petition the petitioner shall in the prescribed manner serve on the respondent a notice of the presentation and of the nature of the proposed security and a copy of petition. . . . ." It is said that there would be hardship supposing money deposited, if mere omission of notices should prevent a petition. I see no more hardship than may occur in any case where a definite time is to be observed, and I see good reason why it

1879

WILLIAMS v. MAYOR OF TENBY.

should be so. There are two alternatives given, and it is reasonable that the party should know which has been adopted, viz. deposit or recognizance, and, if the latter, that he should be set instantly on inquiry whether the securities are good and valid or not. The 23rd General Rule of Michaelmas Term, 1872, provides that "any objection made to the security shall be heard and decided by the master subject to appeal within five days to a judge, upon summons taken out by either party, to declare the security sufficient or insufficient." So not only is the person depositing security limited by the rules as to time, but the person objecting to the security is limited likewise. If we were to carve out of this procedure what is permissive and what is peremptory, we should launch persons into greater litigation than even they embark on, for we should be asked to vary the particular time in each case. I think the petitioners in these cases are advised by competent persons, and ought to pursue the provisions of the Act.

One other argument was founded on rule 44, that "all interlocutory questions and matters, except as to the sufficiency of the security, shall be heard and disposed of before a judge, who shall have the same control over the proceedings under the Corrupt Practices Municipal Elections Act, 1872, as a judge at chambers in the ordinary proceedings of the superior Courts, and such questions and matters shall be heard and disposed of then by any judge at chambers." That rule seems to leave the question where it is. If it is matter of procedure, then the judge will have some powers. But if the Act does not give these powers, then he has them not. The question still is whether the provisions of the Act are or are not peremptory. I think they are peremptory, and that the terms not complied with are conditions precedent, which ought to be complied with before the petition could be presented. The appeal must be dismissed.

LOPES, J. I remain of the same opinion that I held at chambers, and, moreover, entirely concur in the reasons given by my Brother Grove.

Appeal dismissed, with costs.

Solicitors for petitioner: *Norris, Allen, & Carter.*
Solicitor for respondents: *Parker.*

PIERPOINT *v.* CARTWRIGHT AND ANOTHER. 1880

March 5.

County Court—Appeal—Judge's Note—Request for "at the Trial"—38 & 39 Vict. c. 50, s. 6.

38 & 39 Vict. c. 50, prescribing a mode of appeal by motion from the county court, by s. 6 enacts that "at the trial or hearing" of the cause "the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause":—

Held, that the request for a note must be made during or immediately at the end of the trial or hearing of the cause; and, therefore, that a request not made until an hour and a half after judgment given was too late.

5 Q B D 362

APPEAL from the Warrington County Court.

The action was brought by the plaintiff, an agent of an insurance office, to recover money paid at the request of the defendants as the deposit and premium on a policy which he had effected for them. At the trial the defendants disputed only their acceptance of the policy and the plaintiff's authority from them to pay the money. The county court judge took notes of the evidence, but was not during the trial requested to take, and did not then take, a note of any point of law. He gave and entered judgment for the plaintiff. The defendants went away, but an hour and a half afterwards returned to the court and made an application to the judge, who thereupon made an addition to his note as follows: "After judgment was given I am asked to reserve the following point, which I reserve accordingly—that the plaintiff was not entitled to maintain this action;" and the judge added his findings of fact on the evidence.

A rule nisi having been obtained under 38 & 39 Vict. c. 50, s. 6, to set aside the verdict and enter a nonsuit, or for a new trial,

McClymont, shewed cause. It will be suggested as ground for a new trial, that the express or implied contract sued upon was made, if at all, with the insurance office, and not with their agent, who therefore cannot maintain the action. But it is evident, from the notes, that no such point was raised at the trial.

Bray, in support of the rule. The county court judge was

1880

PIERPOINT v. CARTWRIGHT.

wrong in holding the agent liable, for the contract was for a disclosed principal. There was no evidence of the defendants' liability to the plaintiff. The request that a note should be taken was in time, though made after judgment. Misdirection in summing up or in giving judgment is sometimes not perceptible until the conclusion. The procedure prescribed in 38 & 39 Vict. c. 50, s. 6, was intended to facilitate appeals, and to be a more simple and cheap mode of appealing than by a special case. A request for a note is not a condition precedent: *Hill* v. *Perssé.* (1) Moreover, it is unnecessary if notes are taken. Reserving a point, as was done by the judge in this case, is equivalent to giving leave to appeal.

GROVE, J. The rule must be discharged. We should be departing from several previous decisions—most of which are unreported, because the same point has been so often decided,—if we were to hold that, there could be an appeal from this judgment of the county court. I by no means intend to say that the request which must be made at the hearing to the judge to take a note must necessarily be made the moment the last word of the judgment has been pronounced. That would be going too far. There should be an opportunity given to the party of immediately doing what is equivalent to the old form of tendering a bill of exceptions, and if that is done quam primum, as it would be in the case of an interlocutory judgment, I do not say it would not be sufficient. But in this case I am satisfied from the notes and arguments that no such point as that now sought to be raised was taken until some considerable time after the judgment was delivered and the case at an end. I think that is not a compliance with the words of 38 & 39 Vict. c. 50, s. 6, which enacts that, "at the trial or hearing" of the cause, "the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause." I can only read these words, "his decision thereon," as his decision on the matter in respect of which he is asked to take a note, and it is necessary, of course, to add his decision of

(1) 25 W. R. 275.

the cause, which might be in favour of the party requiring the note, that he may know what is decided. When is "at the trial or hearing?" Why, when the case is fairly concluded. I think the object of s. 6 is to prevent parties, after the hearing is over, reflecting on the judgment and finding objections which might possibly, if taken at the proper time, have been removed by recalling a witness or otherwise. Until the hearing is over the right of the parties to ask that a note should be taken remains. But here the objection, not having been taken until an hour and a half after the judgment, was clearly too late. The result of holding it to be sufficient would be to entirely deprive the opposite party of the benefit of s. 6, and that in every case the dissatisfied party would wait and take the judgment to his solicitor, who might perhaps even consult counsel, and come back the next day or some time within the eight days limited for appeal, and raise an objection, and ask the judge to take a note, as if it was at the hearing, of a point of law which should have been taken at the hearing. This would not only be a great advantage to persons postponing the point but enormously increase the number of appeals. Therefore, I am of opinion that the case comes expressly within the decision given by the Lord Chief Justice and myself in *Rhodes* v. *Liverpool Commercial Investment Co.* (1), where the defendant neglected to move for a nonsuit, and I said and now repeat that the object of the 38 & 39 Vict. c. 50, s. 6, "as is stated in *Cousins* v. *Lombard Bank* (2) is, to prevent that which would work manifest injustice, viz., persons taking their chance of the decision of the county court judge being in their favour, and afterwards, on finding the decision against them, taking advantage of a mistake in some point of law to which the attention of the judge had never been called." I will add that I must not be supposed to say that if immediately after judgment given an application is made giving the judge an opportunity at the time to correct the matter objected to, that would not be sufficient. But that was not so here. If the county court judge is asked to take, and forgets to take, or does not take, a note, the party ought not to be deprived of his right of appeal, but the judge must be asked at the hearing.

(1) 4 C. P. D. 425. (2) 1 Ex. D. 404.

1880

PIERPOINT v. CARTWRIGHT.

Further, I think the question in this case was one of fact not of law, although it is unnecessary so to hold.

LINDLEY, J. I am of the same opinion. In order to entitle the party to proceed by way of motion he must pursue the course pointed out by the Act of Parliament. It has been already decided in *Cousins* v. *Lombard Bank* (1) that s. 6 does not give him liberty to appeal on a question of fact. The appeal must be on a question of law, and the proceeding by motion is prescribed as being cheaper and more simple than by special case. To avail himself of the privilege he must "at the trial or hearing" of the cause request the judge to take a note "of any question of law raised at such trial or hearing and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause." First, what is the meaning of "at the trial or hearing?" I think the words mean what they say, and that "at the trial or hearing" cannot be when it is completely over. Suppose the county court judge tries a case without a jury, and no particular point of law or of fact relating to the point of law arises, but while giving his decision one of the parties perceives that the judge is pronouncing judgment on reasons unsound in point of law, it is quite competent to either party, as soon as an opportunity arises for interfering, to ask the judge to take a note, and I should say that an application so made was "at the trial." But here the judge writes "Judgment for the plaintiff." That means something more than that he has given his reasons. Then he adds to his note, that "After judgment," which certainly does not mean "at the trial," he was asked to reserve the point now sought to be raised. That seems to me to have been neither in fact nor in substance "at the trial." The trial was over. On that short ground it appears to me the rule should be discharged.

I have assumed for the purpose of my decision that if a note had been taken on request there would have been an appeal, but I do not think that is at all necessarily involved in the judge's certifying as he has done here. He might have reserved his opinion whether he would give leave to appeal or not. I think having read the facts, there is no question of law, and I think

(1) 1 Ex. D. 404.

that he was right on the facts. I do not wish to encourage an appeal by special case in this action.

1880

PIERPOINT v. CARTWRIGHT.

Rule discharged.

Solicitors for plaintiff: *Horne, Hunter, & Birkett.*
Solicitor for defendants: *A. Harrison.*

PORTER *v.* DREW AND ANOTHER.

Feb. 26.

Landlord and Tenant—Lease—Covenants—Express—Implied—Underlease—Fixtures.

An underlease of a nursery ground contained an express covenant by the under-lessee to deliver up all landlord's fixtures thereon at the end of the term:—

Held, that a representation and covenant by the grantors of the under-lease that the underlessee should be at liberty, without hindrance from any one, to remove trade fixtures during the term, and that the grantors had not entered into covenants inconsistent with such right, could not be implied.

CLAIM: On the 11th of November, 1871, the defendants by an indenture of lease under seal leased to the plaintiff, who is and was by trade a nurseryman, a messuage and nursery ground, known as the Paragon Nursery, for the term of six and a quarter years less the last three days thereof, from the 24th of June, 1872, at a rental of 60*l.* per annum, and the indenture contained, amongst other covenants, on the part of the plaintiff, the lessee, the following: "and that the lessee, his executors, administrators, or assigns, will at the expiration or sooner determination of the said term, deliver up to the lessors, their heirs or assigns, the said premises and all landlord's fixtures which may at any time during the said term be in or about the same." The indenture did not contain the usual limited covenant by the lessors, for quiet enjoyment of the premises by the lessee, nor any express covenant for quiet enjoyment.

2. The plaintiff remained in possession of the premises until the lease expired by effluxion of time on the 26th of September, 1878, and during the time of his possession, with the knowledge and acquiescence of the defendants, placed certain greenhouses and other trade fixtures upon the nursery ground, and annexed the same to the freehold. The plaintiff, in so placing and annexing

1880

PORTER v. DREW.

the trade fixtures, relied upon the said express provision in the covenant whereby the tenant at the expiration of the term covenants to deliver up to the lessors all landlord's fixtures, to the exclusion of trade fixtures, and upon the implied representation and covenant of the lessors that the plaintiff should be at liberty, without hindrance from any one, to remove during the continuance of the term the said fixtures, and that they, the defendants, had not at the time of the execution by them of the lease entered into covenants or engagements or done anything inconsistent with the right of the defendant as lessee to carry on the trade of a nurseryman, and remove before the end of the term trade fixtures annexed by him to the nursery ground during the term.

The defendants at the time when they executed the lease to the plaintiff as such nursery gardener as aforesaid, were themselves tenants of the nursery garden and premises under a superior lease expiring at Michaelmas, 1878, containing a covenant by the lessees to deliver up at the expiration of the term not only all landlord's fixtures, but also all trade fixtures annexed during the last seven years of the term under the superior lease.

The plaintiff was not aware until the granting of the injunction hereinafter mentioned that the defendants held under the superior lease, or any lease containing any covenant for the delivery up of trade fixtures, or any covenants in restraint of trade, or other unusual covenants.

Shortly before the determination of the term under the lease by the defendants to the plaintiff, the plaintiff sold the greenhouses and other trade fixtures to one Hall for 120*l.*, but afterwards the reversioners under the superior lease obtained, ex parte, an interim injunction, and commenced an action in the Chancery Division to restrain the plaintiff from removing the trade fixtures. The plaintiff acting reasonably defended the action, but judgment was given therein for the reversioners with costs, and a perpetual injunction granted, restraining the now plaintiff from removing the trade fixtures, whereby he was prevented from performing the contract of sale to Hall, and lost the price of the fixtures, and became liable to costs. The plaintiff claimed the value of the fixtures and the costs of defending the action brought by the reversioners.

Defence. Denial, inter alia, of the allegation that the plaintiff placed the greenhouses and other trade fixtures upon the nursery ground with the knowledge or acquiescence of the defendants, and demurrer to the rest of paragraph 2, on the ground that the tenant's express covenant to deliver up all landlord's fixtures, and the facts, as in the statement of claim alleged, did not in law create an implied covenant on the part of the lessors either that the tenant should be at liberty to remove the trade fixtures during the continuance of the term, or that the lessors had not at the time of the execution by them of the lease entered into any covenant or engagement or done anything inconsistent with the right of the tenant to remove trade fixtures annexed by him during the term.

A. Wills, Q.C. (*Kingsford*, with him), for the defendants. No such representation or covenant as that alleged in paragraph 2 of the defence can be implied from the express covenant in the lease. The plaintiff had constructive notice of the provisions of the original lease, as he had a fair opportunity of ascertaining what they were: *Hyde* v. *Warden*. (1) Unless, indeed, it appears that he made careful inquiries at the time of taking his lease and learnt nothing which should have set him on further investigation: *Parker* v. *Whyte*. (2) But there is nothing to shew that he made any inquiry, and if he takes his lease without inquiry he has constructive notice of at least all usual covenants in the original lease: *Flight* v. *Barton*. (3) The fact of the lease to the plaintiff being for six and a quarter years, less the last three days thereof, would inform him that it was only an underlease.

[*R. V. Williams*, for the plaintiff, admitted that he knew there was a superior lease, but did not know the terms of it.]

Then he should have inspected it. It is impossible to imply a representation to him by the defendants that if they chose to put up trade fixtures there was no covenant in the superior lease preventing the removal of them. Even if there were such a representation an action could only be maintained on the ground of fraud.

(1) 3 Ex. D. 72. (2) 1 H. & M. 167.
(3) 3 My. & K. 282.

1880

PORTER v. DREW.

R. V. Williams, for the plaintiff. The case depends on two questions; first, whether, from the grant of a lease in the terms and under the circumstances stated, a representation by the defendants that the plaintiff would be allowed to remove trade fixtures will be implied. Secondly, if so, and such representation were untrue, is that a cause of action?

The lease was of a nursery ground. The parties evidently contemplated that valuable greenhouses would be placed on it by the plaintiff. Those are trade fixtures. An express covenant was entered into that the landlord's fixtures should be given up, and consequently there was an implied representation or covenant that the other fixtures might be removed. From an express stipulation in an agreement by a lessee to grant an underlease, a representation will be implied that there is nothing in the superior lease inconsistent with such stipulation: *Van* v. *Corpe.* (1) Surely a leaseholder who requires from a sub-lessee a covenant not to carry on a particular trade, as of a baker, impliedly represents that any other trade may be carried on. If an agreement for a lease contains no stipulation as to covenants, the party agreeing to take the lease has a right to a lease containing only usual covenants: *Propert* v. *Parker* (2), and the constructive notice on which the defendants rely is only of usual covenants: *Flight* v. *Barton.* (3) There the lessee failed to inform a person agreeing for a sub-lease that there was a covenant in the superior lease prohibiting the trade which he proposed to carry on, and Sir John Leach, M.R., held that the silence of the lessee was equivalent to a representation that there was no such prohibitory covenant. Here there was an unusual covenant, and more than mere silence, for the defendants were aware that the plaintiff was about to carry on a trade involving the erection of trade fixtures, and led him to believe he could remove them. *Cosser* v. *Collinge* (4) is somewhat adverse to the plaintiff, but it may be considered as settled that the principle of that case can only be applied where the sub-lessee has a fair opportunity of ascertaining for himself the provisions of the original lease: see per Brett, L.J., *Hyde* v. *Warden.* (5)

(1) 3 My. & K. 269.
(2) 3 My. & K. 280.
(3) 3 My. & K. 282.
(4) 3 My. & K. 283.
(5) 3 Ex. D. 72.

1880

PORTER v. DREW.

Wills, Q.C., replied. The cases cited of suits for specific performance are inapplicable. The Court of Chancery merely refused to force a man to take one thing when he had agreed for another. The construction of a lease is quite a different question. In *Dennett* v. *Atherton* (1) the defendant being under a covenant not to permit the trade of a beerseller on the premises, made a lease whereby the lessee covenanted not to carry on certain other trades (that of beerseller not being one) and the defendant covenanted for quiet enjoyment. The Court of Exchequer Chamber held that the express covenant for quiet enjoyment excluded any implied covenant and did not amount to a warranty to the lessee that he might use the premises for any purpose not mentioned in the restrictive covenant he had entered into.

If the contention for the plaintiff were to prevail the doctrine of implied covenants would be dangerously extended.

GROVE, J. I am of opinion that the demurrer must be allowed. In the second paragraph of the claim the plaintiff, putting his own construction on the covenant, alleges that he relied upon the express provision in the covenant whereby the tenant at the expiration of the term covenants to deliver up to the lessors "all landlord's fixtures to the exclusion of trade fixtures." Such exclusion was, however, not express but, if anything, implied. The express covenant was only to deliver up all landlord's fixtures. This might not unreasonably be said to imply that the tenant was not bound to deliver up some other fixtures, and that his landlord would not claim other than landlord's fixtures. But the plaintiff seeks to extend the implied covenant much further. On his construction it would be not only a covenant by the landlord not to himself interfere with other than landlord's fixtures, but that he will prevent anybody else interfering, and will guarantee the tenant against the head landlord taking these fixtures as being immoveable, and will either prevent the head landlord seizing them or will pay damages for breach of covenant; and indeed I do not see why such guarantee should not apply to anybody else connected with the landlord and having a legal claim to the fixtures. Moreover the alleged implied covenant is not restricted

(1) Law Rep. 7 Q. B. 316.

1880

PORTER v. DREW.

to things on the premises at the date of the lease to the plaintiff. These indeed are not claimed at all. The claim is for fixtures placed on the premises subsequently to the execution of the underlease.

It seems to me that if such an implied covenant as the one alleged were to be implied from an express covenant to deliver up all landlord's fixtures, it would be difficult to fix the limit of implied covenants. It would come to this: that in, perhaps, a short lease containing one or two covenants only, we must imply that the landlord covenants against everything else relating to the subject matter, because he makes one or two stipulations with respect to himself. The argument cannot stop short of this—that the defendants not only disclaimed all except landlord's fixtures, but guaranteed against interference by the head landlord. It would be a strong implication indeed. Nothing in the cases cited goes nearly so far. Moreover it is admitted that, the three last days of the six-and-a-quarter years being excepted from the term, the lease on the face of it obviously refers to some other lease, and shews there is some other lease. Mr. Williams, indeed, admitted that the tenant knew of a head lease.

Under these circumstances am I to imply a covenant by way of warranty that the head landlord shall not interfere with the tenant, who has had an opportunity of looking into the head lease and knows of its existence, merely because the defendants have put into the sub-lease some fixture-covenants for their own benefit? It would be unreasonable, and involve every one drawing leases in great difficulty, if he would have to anticipate that other things might be inferred from the insertion of a covenant as to one particular matter. I can imply no such covenant as that on which the claim is founded. I will now examine some of the authorities cited to see if they bear out the plaintiff's case.

First, as to the distinction between an action for specific performance and an action for breach of covenant which Mr. Wills pointed out. Suppose that, instead of this being an action for damages, an agreement only had been signed in the terms of this lease and the lessee had sought to enforce specific performance—not of what was in the agreement but—of a stipulation that neither the lessor, nor the head landlord should interfere to prevent

the lessee taking away the fixtures. I do not think any Court would order specific performance of anything but that which is fairly involved in the words.

The cases are a little conflicting. *Cosser* v. *Collinge* (1) goes farthest of them all. There an unusual covenant, or a covenant held to be unusual, was contained in a head lease, and the Court decided that there being merely notice of the head lease, but ample opportunity of seeing it at the solicitor's office, the defendant was liable to the covenants of the head lease, although they were unusual. The Master of the Rolls in the first part of his judgment decides the case quite irrespective of the fact that the head lease was at the solicitor's office, and might have been inspected, and then goes through the evidence and comes to the same conclusion. The other cases do not go quite so far, for in *Flight* v. *Barton* (2) it was held that where a lessee knows of the existence of a head lease, he has constructive notice of all usual covenants in it. But the question is whether he has notice of unusual covenants. Then, in *Van* v. *Corpe* (3), there was an express provision, which it was said amounted to a representation that there was nothing in the superior lease but the usual covenants. The agreement was that there should be all usual covenants, and that the house should not be turned into a school; and it was held, in an action for specific performance of an agreement for a lease with all usual covenants, that the party was bound to grant a lease with all usual covenants in it. That does not touch this case, and I am rather surprised the point should have been disputed there. In *Propert* v. *Parker* (4) the lessee did not know of the head lease, so that case does not properly apply to the present one. On the other hand, *Dennett* v. *Atherton* (5) appears in favour of this demurrer.

None of the cases support this statement of claim, or decide that because a person covenants for his own benefit that certain things shall be done, he is therefore to be taken to imply not only that certain other things shall be done, but that he will guarantee that the landlord, or even others, shall not interfere. On that

(1) 3 My. & K. 283.
(2) 3 My. & K. 282.
(3) 3 My. & K. 269.
(4) 3 My. & K. 280.
(5) Law Rep. 7 Q. B. 316.

1880

PORTER v. DREW.

distinction, which is a broad one, my judgment is mainly based. But there is another point. Supposing a person having a covenant on a particular subject might be held to imply the converse of it: for example, suppose the covenant here should imply that no other than landlord's fixtures should be given up, ought not the covenant only to be implied when the matter must be, I will not not say reasonably but, necessarily in the contemplation of the parties, for otherwise it would fix them with a covenant not in their thoughts at all? Here, for instance, was a nursery ground: could it be said that, because the subject-matter of the demise happened to be a nursery ground, the landlord is to be supposed to be bound as to fresh buildings of a character not called landlord's fixtures, and to be guaranteeing the tenant against removal. A very strong construction that would be. It would, in fact, be making the landlord covenant for a matter which he never might have thought of at all. If it were an old nursery ground, nobody would suppose any more erections were going to be placed on it. Yet it is said that the landlord is making himself liable to protect the tenant against the head landlord claiming anything other than landlord's fixtures placed on the premises during the term.

Judgment for the defendants, with costs; leave to the plaintiff to amend.

Solicitors for plaintiff: *Harper, Broad, & Battcock.*

Solicitors for defendants: *Wilkinson & Drew.*

March 4.

LUCAS *v.* DICKER.

*Bankruptcy, Act of—Notice of Petition—Execution Creditor—Protected Transaction—*32 *&* 33 *Vict. c.* 71, *s.* 95, *sub-s.* 3.

Where goods have been seized under a fi. fa., a notice to the execution creditor which states that a petition in bankruptcy against the execution debtor has been filed on a date, at a Court, and by a person named in the notice, is sufficient notice of an act of bankruptcy to prevent the execution being a protected transaction within 32 & 33 Vict. c. 71, s. 95, sub-s. 3, if bankruptcy should follow and the title of the trustee relate back to an act of bankruptcy prior to the seizure; because such petition must necessarily be founded on an act of bankruptcy.

SPECIAL CASE stated pursuant to an order made by Field, J., at chambers.

The question to be determined between the parties was whether

806*l.* 19*s.* 6*d.*, the proceeds of an execution levied on the goods of Lord Charles Ker, a bankrupt, belonged to the plaintiff as the trustee of the bankrupt's estate, or to the defendant, the execution creditor. The execution was levied on the 17th of April, 1879, but the sale under it was delayed in consequence of a claim (which was afterwards barred) being made to the property by a third party.

On the 6th of May, 1879, the execution creditor was served with the following written notice:—

"18, Old Burlington Street,
"London, W., 6th May, 1879.

"In the High Court of Justice,
"Common Pleas Division.
"Dicker *v.* Lord C. J. Innes Ker.

"Take notice that a petition in bankruptcy was on the 23rd April last, filed in the County Court of Berks, holden at Windsor, by John Rigby and Thomas Gullick, against the above-named debtor, and the hearing thereof is fixed for the 10th May, inst., at 11 A.M., and take notice that a second petition in bankruptcy was on the 1st day of May, instant, also filed in the last-mentioned Court by Walter Thornhill and Henry Nimrod Walker, and that the hearing thereof is appointed for the 17th of May, inst., at 11, also at the said county court at Windsor.

"Yours, &c.,
"Thos. A. G. Powell,
"Solicitor for the said Lord Charles J. I. Ker."

The facts stated in the notice were true.

After the receipt of the notice the sheriff, by the direction and at the request of the execution creditor, caused the property seized to be sold. Some was sold on the 7th, and the rest on the 13th of May, 1879. The proceeds of the sales, after paying expenses, &c., amounted to 806*l.* 19*s.* 6*d.*

The execution creditor up to the date of the service of the notice had no notice or knowledge whatever of any act of bankruptcy by the debtor, and never at any time after that date, and previously to the sales, had notice of any act of bankruptcy by the debtor, save in so far that he, the execution creditor, was affected

1880

LUCAS v. DICKER.

with notice by the receipt of the notice aforesaid of the 6th of May, 1879.

On the 30th of May, 1879, he took out a summons calling upon the execution debtor and the sheriff to shew cause why the sheriff should not pay to him the 806*l.* 19*s.* 6*d.* The hearing was adjourned. The execution debtor was adjudicated bankrupt on one of the petitions on the 21st of June, 1879, the act of bankruptcy having been committed on the 31st of March, 1879.

On the 12th of July, 1879, the plaintiff was appointed trustee in bankruptcy, and on the 14th gave notice thereof to the sheriff, who thereupon brought the summons to a hearing, at which Field, J., ordered the money to be paid into court, and this case to be stated. The question was whether under the circumstances above stated the plaintiff as trustee, or the defendant as execution creditor, was entitled to the balance of the 806*l.* 19*s.* 6*d.* paid into court.

Graham, for the plaintiff. The order of events was as follows: 1. Act of bankruptcy; 2. Judgment; 3. Seizure; 4. Petition; 5. Notice; 6. Sale. The title of the trustee relates back to the act of bankruptcy, unless the execution is a protected transaction within the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 95), which protects any execution "executed in good faith" by seizure and sale before the date of the order of adjudication, if the person on whose account such execution was issued had not, at the time of the same being executed by seizure and sale, "notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication": sub-s. 3.

First. The letter of the 6th of May, 1879, was sufficient notice of an act of bankruptcy: Williams on Bankruptcy, 2nd ed., p. 275; *Hope* v. *Meek*. (1) Notice means knowledge of an act of bankruptcy, or wilfully abstaining from acquiring such knowledge: *Bird* v. *Bass*. (2) Absolute knowledge is not necessary. It is enough to state facts which would put a reasonable man on inquiry. Here notice is given that two petitions had been presented, and were on the files of a court named, where they might be inspected. Precise information is afforded as to the

(1) 10 Ex. 829. (2) 6 M. & G. 143.

persons by whom, the times when, and the place where the petitions were filed. Notice in a general form has been held good: *Turner* v. *Hardcastle.* (1) The nature and date of the act of bankruptcy need not be notified. *Hocking* v. *Acraman* (2) may, perhaps, be cited for the defendant. There notice of a docket having been struck under the old bankruptcy law was held insufficient notice of an act of bankruptcy. But that was because a docket gave no notice of an act of bankruptcy, and, as Parke, B., pointed out, a provision in an earlier statute, 46 Geo. 3, c. 135, making the striking of a docket notice of an act of bankruptcy had been repealed by 49 Geo. 3. When a docket was struck the act of bankruptcy was not stated. But a petition states such an act. General notice that the bankrupt "had committed several acts of bankruptcy" is sufficient, and the notice need not state the nature or particulars of any act: *Udal* v. *Walton* (3), for there are many different kinds of acts of bankruptcy, and it would be almost impossible to state with accuracy what ought to be the form of notice adapted to each act. In *Evans* v. *Hallam* (4), the notice was merely of an assignment which did not necessarily amount to an act of bankruptcy. It was at least equivocal.

Secondly. If the notice was valid notice of an act of bankruptcy, the seizure and sale afterwards was not executed in "good faith," and so the trustee was entitled to the proceeds of the goods.

G. Pitt-Lewis, for the defendant. The notice was insufficient. "The statute protects the execution creditor, unless he has notice of an act of bankruptcy. It is not notice of an act of bankruptcy to say something to him which might possibly put him to further inquiry; it is not notice to tell him something which, if he were to inquire further, would shew him that an act of bankruptcy did exist:" *Evans* v. *Hallam.* (5)

Even if an inference of some act of bankruptcy could be drawn from the notice of a petition, such notice would not be enough. The act of bankruptcy must, in order to defeat the execution creditor, have been committed before the seizure: *Ex parte*

(1) 11 C. B. (N.S.) 683.
(2) 12 M. & W. 170.
(3) 14 M. & W. 254.
(4) Law Rep. 6 Q. B. 713.
(5) Law Rep. 6 Q. B. 713, at p. 716, per ~~Blackburn, J.~~ Cockburn C.J.

1880

LUCAS v. DICKER.

Todhunter (1); *Ex parte Schulte* (2); *Edwards* v. *Scarsbrook.* (3) The Act protects the execution creditor, unless he has notice of an act of bankruptcy, not merely notice of a petition filed; and, as Lord Abinger said in *Hocking* v. *Acraman* (4), it is "better to adhere to the precise words of the Act, than to substitute something else in lieu of that which the statute requires."

[LINDLEY, J. But you wish us to insert words which are not in the Act, viz., words stating that the act of bankruptcy was before the seizure.]

The legislature have distinguished between the notice of a petition prescribed in s. 87, where goods of a trader have been seized, and the notice of an act of bankruptcy in s. 95, sub-s. 3. This debtor was not a trader. The creditor is entitled to have "such information as will enable him to determine on his right at the time:" *Conway* v. *Nall.* (5) Suppose the act of bankruptcy were before the date to which the title of the trustee would relate back? The creditor is not bound to go and search the file. He might have done so in *Hocking* v. *Acraman* (6), but the Court held that the notice of a docket struck was not enough, because it "merely informs the party that another person had taken a step adverse to him:" *Udal* v. *Walton.* (7) Notice of a petition does no more. Those two cases have not been overruled.

Graham replied.

LINDLEY, J. I am of opinion that judgment should be given for the plaintiff. Apart from the question of a protected transaction, the title of the trustee relates back to a date anterior to the date of the title of the execution creditor. The title of the trustee dates from the 31st of March, the title of the execution creditor from the 17th of April. Primâ facie, therefore, the trustee is entitled to the sum in question. It lies on the execution creditor to displace that primâ facie case. In order to do so he must shew that under the Bankruptcy Act (32 & 33 Vict. c. 71), s. 95, sub-s. 3, the execution was "executed in good faith by seizure

(1) Law Rep. 10 Eq. 425.
(2) Law Rep. 9 Ch. 409.
(3) 32 L. J. (N.S.) Q.B. 45.
(4) 12 M. & W. 170, at p. 177.
(5) 1 C. B. 643, per Erle, J.
(6) 12 M. & W. 170.
(7) 14 M. & W. 254, per Pollock, C.B.

and sale before the date of the order of adjudication," and that he "had not at the time of the same being executed by seizure and sale notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication." It appears to me that the defendant was in fact an execution creditor "acting in good faith" within the meaning of the section. He was beyond doubt acting hostilely, and not in collusion with the execution debtor. He was acting with all diligence and running a race for priority with the trustee, but he was entitled to do so, and to exercise his rights as the law allows. I understand the expression "good faith" to mean "good faith" as contrasted with collusion by the execution creditor. The real question here, however, is whether he had before sale notice of an act of bankruptcy committed before sale and available for adjudication. The facts are, that before the sale and after seizure he received the notice in question. [The learned judge read it.] What is that notice? It is said that it is not notice of an act of bankruptcy. Presentation of a petition is not of itself an act of bankruptcy. But, on the other hand, a petition for adjudication is mere waste paper if it is not founded on an act of bankruptcy. So when a person is informed that a petition has been presented, he is informed that an act of bankruptcy has been committed, and I think that notice of a petition is notice of an act of bankruptcy, and that we shall not press the doctrine of constructive notice too far if we so hold. The learned counsel for the defendant argued that the notice required must be of such an act of bankruptcy as will defeat the right of the execution creditor, but he thereby asked us to read into the Act of Parliament words which are not there. The words of s. 95, sub-s. 3 are, "notice of any act of bankruptcy," and I think that if the execution creditor has notice of an act of bankruptcy he remains at risk; if it does not override his title, so much the better for him, if it does, so much the worse, and his title is defeated. This appears from *Udal* v. *Walton* (1) and *Hocking* v. *Acraman* (2), in both of which cases the notice was general and gave no information as to the nature of the act or of the time at which it was committed, and that was commented upon in *Udal* v. *Walton* (1) and dealt with by Pollock, C.B., who

(1) 14 M. & W. 254. (2) 12 M. & W. 170.

1880

LUCAS v. DICKER.

said that on the true construction of the Act it required only notice of an act of bankruptcy having been committed.

Hope v. *Meek* (1) is a case of the same kind. But Mr. Lewis referred more particularly to *Evans* v. *Hallam* (2), and contended that it is an authority to shew that the notice must be more specific and precise. There the notice was held to be insufficient, but it was a notice of an assignment, and the judgment of the Court must be considered with due regard to the facts before it. I agree with the observation of Lush, J., who said: "A stranger reading the letter would not, I think, be at all under the impression that the debtor had made an assignment for the benefit of all his creditors, but would think that he had made an assignment to his daughter in order to raise money to pay his creditors" (3), in other words, that the notice did not at all point necessarily to the commission of an act of bankruptcy. The Court held, that on the terms of the letter the execution creditor had not notice of that act of bankruptcy or any other act of bankruptcy. Some passages were indeed cited to us which seemed to shew that the notice must be more precise, but I think they applied to particular cases, and were not intended to overrule the general principles laid down in *Udal* v. *Walton* (4) and *Hope* v. *Meek*. (1) It is true that the letter here, even if looked at, would not have given information to the execution creditor as to whether the act of bankruptcy was committed before or after the seizure, but I think the moment that he gets the notice he must take his chance whether it will defeat him or not.

LOPES, J. I think the notice was sufficient. *Evans* v. *Hallam* (2) at first raised some doubt, but, when carefully looked at, the notice there appears to have been notice of that which was not necessarily an act of bankruptcy, and indeed seems rather notice of a transaction which might not be an act of bankruptcy. The Court held that that notice was too vague, and I quite understand why. But can it be said that the notice in this case was not notice of an act of bankruptcy? True, it does not mention any act of bankruptcy, but it mentions petitions which must have been founded on an

(1) 10 Ex. 829.
(2) Law Rep. 6 Q. B. 713.
(3) Law Rep. 6 Q. B. 713, at p. 717.
(4) 14 M. & W. 254.

act of bankruptcy. I think the notice was sufficient, and that the case is governed by *Udal* v. *Walton*. (1)

1880

LUCAS v. DICKER.

Judgment for the plaintiff.

Solicitors for plaintiff: *Thomas & G. Powell.*
Solicitor for defendant: *Charles J. Allen.*

[IN THE COURT OF APPEAL.]

March 9.

FOULKES *v.* THE METROPOLITAN DISTRICT RAILWAY COMPANY.

Railway—Passenger—Ticket issued by One Company—Injury whilst travelling by Train of Another—Negligence—Liability of Carriers.

The defendants, a railway company, had running powers between H., a station upon their own line, and R., a station of the S. company, over the line of that company. The defendants and the S. company divided the profits of the traffic between H. and R. The plaintiff took a return ticket from R. to H., which was issued to him by a clerk of the S. company. Upon the return journey from H. to R. he travelled in a train belonging to the defendants, and driven by their servants. Owing to the carriage being unsuited to the platform at R., which belonged to the S. company, the plaintiff sustained bodily injury. At the trial the jury found that the defendants had been guilty of negligence:—

Held, that an action lay against the defendants, for they, having permitted the plaintiff to travel by their train, were bound to make provision for his safety.

APPEAL by the defendants from a decision of Grove and Lopes, JJ., discharging a rule to set aside a verdict for the plaintiff.

The facts, as they appeared during the argument in the Common Pleas Division, are fully stated in the report of the proceedings before that Court (2); and, as they appeared during the argument in the Court of Appeal, they are stated in the judgment of Baggallay, L.J., post, p. 160.

Feb. 26, 27. *A. L. Smith* (*Macrae*, with him), for the plaintiff.

Sir H. Giffard, S.G. (*Waddy, Q.C.*, and *E. Clarke*, with him), for the defendants.

The arguments in this court are sufficiently noticed in the judgments. The following authorities were cited in addition to

(1) 14 M. & W. 254. (2) 4 C. P. D. 267.

1880

FOULKES v. METROPOLITAN DISTRICT RAILWAY CO.

the cases mentioned: *Bristol and Exeter Ry. Co.* v. *Collins* (1); *Martin* v. *Great Indian Peninsular Ry. Co.* (2); *Hayn* v. *Culliford.* (3)

Cur. adv. vult.

March 9. The following judgments were delivered:—

BRAMWELL, L.J. In this case the first question is, with whom did the plaintiff contract? The contract was a contract for carriage, the carriage of himself. Who were the carriers? The defendants. The carriages are theirs, the motive power and the servants driving and conducting, they have a right to carry over the whole length the plaintiff is to be carried, and they get and keep at least part of the reward of these things. What ground or reason is there for saying they are not the contractors to carry? The journey is, indeed, part over the road of the South Western Company, and the servants of the South Western Company in the first instance receive the fare. But how does that affect the case? If the defendants' servants had in the first instance received the fare, it is clear the contract would have been with the defendants, and it is therefore clear that the ownership of the road does not affect the question. Nor can it matter whether the defendants receive the fare by the hands of their own servants or those of others: nor in truth that, by arrangement with the South Western Company the South Western Company should receive it mainly for themselves, and only in part for the defendants. The defendants, I repeat, are the carriers, and the contract of carriage is with them. If the interest of the South Western in the matter affects this reasoning, it would at the outside go to shew that the two companies are partners, and the contract was with them jointly. That would not disentitle the plaintiff to recover against these defendants alone. It is impossible to say that the fare was received for the South Western only. Suppose a receiver were appointed of the South Western's tolls and takings; could it be contended that this money could be taken by him without the defendants being entitled to a share of it?

But, further, though the contract were with the South Western,

(1) 7 H. L. C. 194. (2) Law Rep. 3 Ex. 9.
(3) 4 C. P. D. 182.

the plaintiff is entitled to recover against these defendants. In that case there would be no duty of contract, and consequently no cause of action for a nonfeasance. But there would be that duty which the law imposes on all, namely, to do no act to injure another. It is clear that if a porter of the defendants had run a truck against the plaintiff at Broadway station, and hurt him, he could maintain his action against the defendants. So if he had left the carriage there, and while getting in, the train improperly started, and he was hurt, or if his hand was wrongfully pinched. These are clear cases, but the law is the same in cases not so clear; for example, if the carriage he was put in was dangerous, if the step he had to tread on was rotten. Apply that to the present case. The difficulty is with the question and finding: the jury have found there was negligence. Now, there was no negligence. What was done or omitted was wilful. But the substance of the finding of the jury is that the carriage was dangerous with reference to the platform, or the platform with reference to the carriage, and that the plaintiff might and did reasonably act in the belief that they were not in that state, but safe for him to use; that in truth the combined arrangements were a trap or snare: so that if he had been carried gratuitously as by a friend, he would have had a right of action against him. With the propriety of so finding we have nothing to do. There was according to that finding a tort, whether in the defendants alone or in conjunction with the South Western does not matter, and the plaintiff is entitled to recover. I say nothing about the authorities. But if the contract had not been a contract with the defendants, and all that could have been complained of was a nonfeasance, I should hold they were not liable.

BAGGALLAY, L.J. This is an appeal from an order of a Divisional Court of the Common Pleas Division, discharging a rule, which had been granted on the motion of the defendants after verdict and judgment for the plaintiff, and which was treated by the Divisional Court as being in effect, though expressed in somewhat doubtful terms, a rule to enter the verdict for the defendants, on the ground that, upon the facts proved at the trial, there was no evidence to go to the jury of any liability on the

1880

FOULKES v. METROPOLITAN DISTRICT RAILWAY CO.

Baggallay, L.J.

part of the defendants in respect of the alleged negligence, or, in the alternative, for a new trial. I agree with the Divisional Court in the conclusions at which it has arrived as to both of these alternatives. The mistakes which have been made in the course of the proceedings in this action as to material facts and circumstances, and the corrections from time to time made or purported to be made of such mistakes, appear to me to have so important a bearing upon the question whether a new trial should be directed that I propose to allude to them somewhat in detail.

At the very outset of the proceedings, the pleadings on both sides were framed on the erroneous assumption that, on the occasion of the accident which gave rise to the litigation, the plaintiff was travelling from Hammersmith to Richmond with a ticket taken by him at the Hammersmith station of the District Company, whereas he had, in fact, travelled with a return ticket which he had previously taken at the Richmond station of the London and South Western Company; and this erroneous view was apparently acted upon by both parties, at any rate by the defendants, until after verdict and judgment; for it appears from the notes of the Lord Chief Justice, taken at the trial, that the statement then made by the plaintiff that he had taken a return ticket to New Richmond station (a statement in one sense true, but nevertheless calculated to mislead) was in no respect contradicted by evidence on the part of the defendants, nor was he cross-examined upon it. Indeed, so far as I can form an opinion from the notes of the judge and from the allusions to the trial in the printed report of the proceedings before the Divisional Court, it would appear to have been assumed that if negligence was proved against the carrying company, and the contributory negligence which had been suggested was negatived, the verdict must be against the defendants. That this general impression prevailed, is, I think, further shewn by the circumstance that in the printed report (1) it is stated that the paragraph of the statement of claim in which the plaintiff alleged that he had been received by the defendants as a passenger, to be carried by them from Hammersmith to Richmond for reward to the defendants, was

(1) 4 C. P. D. 268.

admitted by the defendants, whereas in fact it was not admitted, and it would consequently have been open to the defendants to negative it at the trial, had they been in a position to do so. The mistake in the report could hardly have occurred, had it not been that the allegation was not in fact disputed, though technically speaking it was not admitted. It was also stated by the counsel for the plaintiff in the proceedings before the Divisional Court, and, apparently without contradiction, that it had been admitted by the pleadings and proved at the trial, that the contract of carriage was made with the defendants. I am aware that, in the course of the proceedings, allusion was made to certain answers to interrogatories which it was alleged had been the subject of comment at the trial, but those answers amounted to no more than a general statement that the tickets issued at the Richmond station were issued by the South Western Company, and not by the defendants, and it was in no way stated in the answers or suggested by them, that the ticket with which the plaintiff had travelled had been issued by the South Western Company. So far then as the facts proved at the trial are concerned, I entirely agree with the views expressed by Grove, J., to the effect that there was ample evidence for the plaintiff and none for the defendants. But I have to refer to another mistake of a very singular character; upon the application to the Common Pleas Division affidavits were read on behalf of the defendants, drawing attention to the mistake under which the pleadings had been framed, and to the fact that the ticket by which the plaintiff travelled had been issued to him by the South Western Company, and upon this fact was based the argument which has been repeated before us, that the contract of carriage was with the South Western Company, and that no liability upon it attached to the defendants. The earlier mistake apparently originated in a statement made by the plaintiff in one of the many conversations held by him with officials of the defendants, when he was referred from one to another upon the subject of his complaint. Among the affidavits so read on behalf of the defendants, was one by Mr. Forbes, the chairman of the District Company, in which he purported to explain the nature of the arrangements between the South Western and District Companies for the working of the

1880

FOULKES v. METROPOLITAN DISTRICT RAILWAY CO.

Baggallay, L.J.

traffic between Richmond and the District station at Hammersmith, and, in so doing, he stated as the effect of such arrangement, that the plaintiff, whilst returning from Hammersmith to Richmond by the return ticket which he had previously taken at the South Western Company's station at Richmond, was a local passenger of the South Western Company, and that the District Company would not receive any part of the toll paid by him. That this was the true nature and effect of the arrangements between the two companies, was assumed and acted upon in the proceedings before the Divisional Court, and the arguments before us were commenced, and were for some time continued, upon the same footing. But in the course of the arguments before us, more accurate and certain information as to the nature and effect of those working arrangements was asked for, and it was then ascertained, and it is now admitted, that, according to the actual arrangements between the two companies, the plaintiff, on the occasion in question, was not, as erroneously stated by Mr. Forbes, a local passenger of the South Western Company, but a through passenger, and in that sense a passenger of both companies, and further that the District Company was entitled to a proportionate part of the price which had been paid by him on his taking his return ticket at the office of the South Western Company. It is difficult to understand how such a mistake could have been made by Mr. Forbes, in respect of a matter so completely within his own cognizance; it is, however, only fair to that gentleman to point out, that the other paragraphs of the same affidavit contain information quite sufficient to shew that the statements to which I have referred could not be accurate; for he had not only explained the distinction, as recognised by the Railway Clearing House, between through and local traffic; but had so far indicated the nature and extent of the interests of the two companies, in the line between Richmond and the District Company's station at Hammersmith, as to lead to the conclusion that the traffic over such lines must, according to the definitions given, be through and not local. But, however this may be, we have now before us for our consideration a very different state of circumstances from that which was placed before the jury at the trial, or was in evidence before the Divisional Court from whose order the appeal is

brought, though Grove, J., appears to have expressed an opinion to the effect that it was not probable that a railway company would run their trains and carriages for several miles as a mere gratuity to the public: this, however, was only an inference drawn by him from surrounding circumstances. Now, having regard to this succession of mistakes and misapprehensions, and bearing in mind that the actual state of circumstances upon which a decision ought eventually to be pronounced had not been submitted to the consideration of a jury, and that this was in part at least, if not entirely, owing to a misrepresentation originating with the plaintiff, I, for some time during the earlier arguments, inclined, and somewhat strongly inclined, to the opinion that a new trial should be directed, and that in such case it might be desirable to abstain from expressing any opinion upon the questions which might eventually arise for decision, and I was the more inclined to this view from the consideration, that I was by no means satisfied that we were even then fully informed as to the actual working arrangements which were in force between the two companies at the time when the accident occurred. But, upon a further consideration of the matter, I have come to the conclusion that we are apparently in possession of all the material facts essential to a final decision; that, if there are any such material facts, they are within the cognizance of the defendants, who have not thought it necessary to direct our attention to them; and that, under these circumstances, a jury could not with propriety come to any other conclusion than one in favour of the plaintiff, provided they were, as we must presume they would be, properly directed as to the law bearing upon the facts detailed to them. To send the matter to a new trial under such circumstances, would, I think, be to entail additional and useless expense upon all parties concerned.

My reasons for coming to the conclusion, that a new trial must of necessity have such a result, are as follows: as I have already stated, it has been urged on behalf of the defendants, the District Company, that the contract of carriage, having been created by the issuing and taking of a return ticket at the South Western Company's station at Richmond, must be regarded as a contract between the last-named company and the plaintiff, and not as a

1880

FOULKES v. METROPOLITAN DISTRICT RAILWAY CO.

Baggallay, L.J.

contract for a breach of which the District Company could be held liable.

I by no means intend to express any dissent from the suggestion so made of a liability on the part of the South Western Company in respect of the breach of the contract of carriage; it may well be that such a liability may co-exist with a liability on the part of the District Company in respect of the negligence alleged against them; we know not, and have no private means of ascertaining, what the South Western Company might urge by way of answer to any such suggested liability on their part; nor again do I deem it necessary to the decision of this case to express any decided opinion as to whether, under all the circumstances of this case, a contract of carriage, in the ordinary acceptation of the term, was created between the District Company and the plaintiff, though the strong inclination of my opinion is in favour of the view that such a contract was created; it appears to me sufficient to say that, apart from and irrespective of any such questions as those to which I have just referred, a duty or obligation was imposed upon the District Company, when they accepted the plaintiff as a passenger by their train, not only to carry him safely to the station where he was to alight, but to provide safe means for his alighting when he arrived at that station. The train by which the plaintiff travelled was in every sense their own; the locomotive and carriages belonged to them, the drivers, guards, and other servants in charge of it, were in their employment and in their pay; the line over which it ran was in part their own, and over the other part they had running powers, and in respect of that portion of the line, over which they had and were exercising running powers, they had the same duties and were under the same obligations relatively to their passengers and to the public generally, as they had and were under in respect of the portion of the line which was their own. The plaintiff was admittedly properly travelling by their line; he had, in the sense in which the word is ordinarily used, been invited to travel by it. The ticket, purporting to give him the right to travel by it, and by virtue of which he did in fact travel by it, had been issued to and paid for by him, with their full consent and concurrence, whether such issue created a contract of carriage binding on and

to be performed by them or not; and, on arriving at Richmond, the plaintiff was invited by the defendants ("required" would perhaps be the more correct expression) to alight.

Now whether the defendants were or were not entitled to any share or interest in the price paid by the plaintiff for his ticket, appears to me to be a matter of no importance, as regards the obligation which they took upon themselves when they invited and received him as a passenger by their train, to carry him safely to his journey's end, and to cause him no injury by the way by wilful or careless acts or omission; but even if the element of pecuniary interest were necessary to impose the obligation I have referred to, such element existed, inasmuch as the District Company had a direct pecuniary interest, small perhaps, but nevertheless substantial, in the price paid by the plaintiff for his ticket, as well as in the price paid for every other ticket issued by the South Western Company under similar circumstances.

Such, then, being the duty or obligation imposed upon the defendants, there cannot, I think, be any question or doubt as to their having failed to discharge it. That the arrangements for the alighting of the plaintiff at the Richmond station were of an insufficient and improper character cannot now be questioned, and it is, in my opinion, immaterial whether the platform was improperly constructed relatively to the carriage, or the carriage improperly constructed relatively to the platform; the latter is perhaps the more correct view, for though a footboard of only an inch and a half in width may occasion no danger or inconvenience, but, on the contrary, may be both safe and convenient, when the carriage is stopping at a platform differing but little in level from that of the floor of the carriage, and when the footboard serves only to stop a gap between the carriage and the platform, as is the case at the stations on the District Company's own lines, it manifestly must become a source not only of inconvenience, but of possible if not probable danger, when the level of the platform is upwards of two feet below that of the carriage, as was the case at the Richmond station on the occasion of the accident to the plaintiff. I should not have adverted to this subject had it not been suggested in argument that the accident was occasioned to the plaintiff, not by reason of any improper construction of the

1880

FOULKES v. METROPOLITAN DISTRICT RAILWAY CO.

Baggallay, L.J.

carriage in which the plaintiff travelled, but by reason of the improper construction of the platform, and that the construction and maintenance of the platform was under the sole control of the South Western Company; but admitting the fact to be so, as it possibly is, it was the duty of the defendants either to adapt the footboard or step of their carriage to the platform it would have to approach, or to arrange for an alteration being made in the platform itself. To carry their passengers in carriages which were in any respect or for any purpose dangerous was, in my opinion, a misfeasance rather than a nonfeasance.

I regret to have to add that in my opinion negligence is too mild a term to apply to the carelessness of which the defendants have been guilty, for it appears from the correspondence that has been put in evidence, that they were warned, I believe before they commenced to run trains to the platform in question, but at any rate before the accident occurred, that their carriages were not adapted for the safe descent of passengers at the Richmond station, and that, should they persist in running carriages so constructed, an accident would almost inevitably occur; the last of these warnings was apparently given two days only before the accident occurred.

For the reasons which I have assigned, I am of opinion that the defendants have entirely failed to make out a case for having judgment entered for them in the action; and that, having regard to all the circumstances of the case, a new trial ought not to be directed.

THESIGER, L.J. I agree that this appeal should be dismissed. If the right of the plaintiff to maintain his judgment depended solely on his establishing a contractual relation between him and the defendants, I should not dissent from the view that such relation has been proved. The affidavit of Mr. Forbes is not in itself inconsistent with the notion that the London and South Western Railway Company, in issuing tickets at their Richmond station for stations on the defendants' line, so issue them as agents for or as partners with the defendants. The notion, too, receives sanction from the decision in *Gill* v. *Manchester, &c., Ry. Co.* (1)

(1) Law Rep. 8 Q. B. 186.

There the contract of carriage purported to be made with the Great Northern Railway Company, but the animal which was the subject of the contract was to be conveyed upon the defendants' line, and there were traffic arrangements between the two companies, under which their rolling stock was treated as one stock, their traffic was interchanged, and the receipts from through traffic were divided by mileage. It was held, that by virtue of those arrangements the Great Northern Railway Company, whether as partners with the defendants or otherwise, became the agents of the latter to make the contract of carriage with the plaintiff. In the present case, under the traffic arrangements between the two railway companies, the defendants supply the rolling stock and carry in the exercise of their running powers the whole of the through traffic, taking a mileage proportion of the receipts from such traffic, with an allowance for working expenses. It is admitted that traffic between Richmond and the defendants' station at Hammersmith constitutes through traffic, and it may therefore be urged with force that in booking such through traffic at Richmond the London and South Western Railway contract, either as agents for the defendants, or for the defendants jointly with themselves. This view is further strengthened by the form of the ticket issued at Richmond to passengers travelling from Richmond on to the Metropolitan District line, when contrasted with that issued to passengers travelling elsewhere, and by what is written over the booking office; and although I am by no means prepared to hold that under traffic arrangements similar to those which exist between the two companies, it is not open to a company in the position of the London and South Western Railway Company to make the contracts of carriage in such a way as to make itself exclusively liable upon them, or to deny that in most cases it must be a question for the jury whose the particular contract may be, I think that, under the peculiar circumstances of the present case and upon the materials before us, the Court would not be justified in disturbing the judgment for the plaintiff and sending that question down for trial.

But it is not necessary for us to rest our judgment upon any contractual relation between the plaintiff and the defendants, for I am of opinion that it has been rightly contended for him that

1880

FOULKES v. METROPOLITAN DISTRICT RAILWAY CO.

Thesiger, L.J.

even assuming the contract of carriage from and to Richmond and Hammersmith to have been made between him and the London and South Western Railway Company exclusively, the defendants are still liable in respect of the wrongful act which led to the plaintiff's injuries, by virtue of their actual reception of him in their carriage on his return journey from Hammersmith to Richmond. In arriving at a conclusion upon the validity or invalidity of this contention, it is necessary to premise the following facts. First, the accident to the plaintiff occurred as he was alighting from the carriage in which he rode on to the platform of Richmond station; secondly, the station, including the platform, is the station of the London and South Western Railway Company, but which the defendants have a right to use in the exercise of their running powers; thirdly, the accident was due to what may be termed equally a defect in the construction of the defendants' carriage relatively to the construction of the platform, and a defect in the construction of the platform relatively to the construction of the carriage; but as at the trial the contract of carriage was treated by the Lord Chief Justice as a contract with the defendants, it was quite immaterial in which way the defect was viewed, and he accordingly put to the jury only the question whether there was negligence in the construction of the platform relatively to the construction of the carriage leading to the accident, and whether there was contributory negligence on the part of the plaintiff; and, fourthly, the finding of the jury in favour of the plaintiff, so far as those questions are concerned, is not now impugned. Starting with these premises of fact, there are certain admitted propositions of law to be borne in mind. First, a railway company issuing a ticket to a passenger for a journey partly on the company's own line and partly on the line of another company may be, and presumably is, responsible for the safety of the passenger on his whole journey, and is liable to compensate him for injuries caused to him by the negligence of railway servants or defective construction of carriages or stations, to whichever company they belong: *Great Western Ry. Co.* v. *Blake* (1); *Thomas* v. *Rhymney Ry. Co.* (2) Secondly, a railway company may under certain circumstances be subject, in favour of a passenger upon such a

(1) 7 H. & N. 987, at p. 991. (2) Law Rep. 5 Q. B. 226, in Ex. Ch. 6 Q. B. 266.

journey as last mentioned, to similar responsibilities, although as between the company and the individual passenger there may have been no contract; as, for instance, in the case of a servant travelling with his master upon a ticket taken by the latter: *Marshall* v. *York, Newcastle, and Berwick Ry. Co.* (1); or of a child of tender years travelling upon a ticket taken by its parent, and even in the case of a child above the age within which the company holds itself out as willing to carry children gratis, but taken by the mother without a ticket: *Austin* v. *Great Western Ry. Co.* (2) The ground upon which these further responsibilities of railway companies are rested is either that stated by Lord Blackburn, then Blackburn, J., in the last cited case, p. 445, where he says: "I think that what was said in the case of *Marshall* v. *York, Newcastle, and Berwick Ry. Co.* (1) was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely;" or it is that to which Lush and Shee, JJ., in the same case inclined, namely, a contract, although not a contract with the individual injured and suing. Whichever ground be taken, the responsibilities are not directly founded upon contract. But, thirdly, the responsibilities of a railway company or any other carrier may be carried still a step further. There are cases in which a carrier may be liable for injuries received by a passenger when carried by him, although no contract for carriage may exist between the carrier and the passenger or any person contracting directly for his carriage; in *Dalyell* v. *Tyrer* (3) the plaintiff had made a contract with a public ferryman under which the latter was bound to carry him daily for a certain period: the ferryman being unable, upon a particular day, to work the ferry, hired a boat and crew for the purpose, and an accident having occurred to the plaintiff through the mismanagement by the crew of a rope, the owner of the boat and crew was held liable to him. So, again, a case of *Reynolds* v. *North Eastern Ry. Co.* (4) decided that where a passenger took a ticket of Company A. for a journey

(1) 11 C. B. 655.
(2) Law Rep. 2 Q. B. 442.
(3) 28 L. J. (Q.B.) 52.
(4) Mentioned in Roscoe's Nisi Prius, 14th ed. p. 591.

1880

FOULKES v. METROPOLITAN DISTRICT RAILWAY CO.

Thesiger, L.J.

over the lines of Companies A., B., and C., and a collision having occurred on the B. railway by reason of the train in which the plaintiff was running into trucks negligently left on the line, the B. Company were liable to the plaintiff in an action of negligence.

These propositions of law have not been disputed by the Solicitor-General in his arguments for the defendants in the present case, and he admits that for certain acts which he denominates misfeasances or tortious acts, the defendants might have become liable to the plaintiff, carried as he was in fact by them, but he denies that they incurred any liability in respect of the defect which led to the plaintiff's accident, whether it be treated as a defect of carriage or of platform. He attempts to draw a line in a case like the present between the commission of an act, which is in itself wrongful, and the omission of some act to which the company would admittedly be bound if the passenger were carried by them under a contract. It is, however, very difficult to see how such a line can be reasonably drawn. Suppose the carriage in which the plaintiff rode had been allowed by the neglect of the defendants to be in an insecure and dangerous condition and an accident had thereby occurred to him; why should the defendants be the less liable to him than if their porter had, as the train was leaving Hammersmith station, negligently shut the carriage door upon the plaintiff's fingers, in which case the Solicitor-General admits the defendants would be liable? Why again, on the other hand, if there is any duty on the part of the defendants towards the plaintiff in respect of the security of the carriage in which he rides, should there not be a duty also in respect of the safety of the place at which he is called upon to alight? I think that the true principle in such a case as the present is that the company, so far as concerns its own line, in which term I include a line over which running powers are exercised, and its own acts and omissions, is under the same obligations in reference to the security of the passenger, as it would have been if it had directly contracted with him. This principle is a reasonable one, for underlying it is the fact that more or less directly or indirectly the carrying company derives a benefit from its carriage of the passenger, and should therefore come under some corresponding obligation towards him, and what more appropriate obligation can there be than the ordinary

one undertaken by railway companies towards their passengers, namely, that of taking due and reasonable care for their safety?

I am of opinion then that the duty of the defendants towards the plaintiff was such as I have described, and, inasmuch as upon the verdict of the jury it must be taken that the defendants failed to fulfil their duty, it follows that the judgment of the Court below in favour of the plaintiff was right and should be affirmed.

Appeal dismissed.

Solicitors for plaintiff: *Faithfull & Owen.*

Solicitors for defendants: *Baxters & Co.*

WAGSTAFF AND OTHERS *v.* ANDERSON AND OTHERS.

March 1.

Ship—Charterparty—Contract to carry—Sale of Goods by Master of Ship.

On the 24th of June the defendants, who were shipbrokers, wrote to the plaintiffs, offering them "room" in a ship called *F. K. Dumas* for certain cement and stone from London to Callao. On the 25th of June the defendants chartered the ship for the voyage, the charterparty providing, inter alia, that the whole ship should be at the disposal of the charterers, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be responsible to all whom it might concern, as if the ship were loaded at her berth by and for the owners independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require without prejudice to the charterparty; and that the charterers' responsibility, except for freight, should cease on the vessel being loaded. On the 26th of June an agreement was made between the defendants, acting for the owners of the *F. K. Dumas*, and the plaintiffs, that the former should receive on board cement and stone at certain freight from London to Callao, and sail on a certain day: freight to be paid one half on signing bills of lading, and the remainder on final discharge at Callao.

The cement and stone were shipped, the half freight paid, and the master signed bills of lading making the remainder payable at Callao. On her voyage the ship, being damaged by bad weather, put into an intermediate port, where the vessel was condemned. The master, being unable to forward the plaintiffs' goods to their destination, sold them. In an action against the defendants for their value, the jury found that the sale was not justified:—

Held, affirming the judgment of Denman, J., that on the construction of the above documents there was no contract between the plaintiffs and the defendants for the carriage of the goods from London to Callao.

APPEAL from the judgment of Denman, J., in favour of the defendants. (1)

(1) 4 C. P. D. 283.

1880

WAGSTAFF v. ANDERSON.

Action to recover damages for the non-delivery and wrongful sale, and also for the conversion of certain railway materials shipped by the plaintiffs on board the *Francis K. Dumas* to be carried from London to Callao.

At the trial before Denman, J., at the Hilary Sittings, 1879, in London, the following facts were proved:—the plaintiffs, being desirous of shipping certain stone and cement for Callao, by their brokers, Smith, Sundries, & Co., entered into negotiations with the defendants Moss & Mitchell, who were shipbrokers at London, and on the 24th of June, 1872, received from them a letter as follows: "We now beg to offer you room in the ship *F. K. Dumas*, hence to Callao, for 750 tons of cement at 30*s.* per ton and 5 per cent., 250 tons of stone at 30*s.* and 5 per cent. The latter not to exceed two tons in each block. The ship to receive cargo on or about the 25th of July, and to sail on or about the 25th of August next." The offer was accepted, and on the 26th of June, 1872, an agreement was entered into as follows: "It is this day mutually agreed between Moss & Mitchell acting for owners of the *Francis K. Dumas*, and Thomas Brassey & Co. (the plaintiffs), that the former shall receive on board in the London Docks 1000 tons of cement in casks $\frac{\text{and}}{\text{or}}$ stone in blocks (the latter limited to 250 tons, and no piece to exceed two tons weight), at the rate of 30*s.* per ton of 20 cwt., with 5 per cent. primage thereon freight from London to Callao. The ship to receive the cement on the 25th of July, and to sail on the 25th of August. The barges as they come alongside shall be immediately discharged, say within the usual seventy-two hours, or Moss & Mitchell undertake to pay demurrage on barges. The cargo to be received at Callao as customary; freight to be paid as follows—say one half on signing bills of lading less two months discount at 5 per cent. per annum, and the remainder on final discharge at Callao. Brassey & Co. to have the option of shipping two boats not exceeding two tons each. Penalty for non-performance of this agreement 1500*l.*"

On the 25th of June, 1872, the defendants Anderson & Co. had effected a charter of the ship *F. K. Dumas*, in which the defendants Moss & Mitchell were joint adventurers. The material parts of the charterparty provided as follows: "It was agreed between

the master on the part of the owners of the ship *F. K. Dumas* and Anderson & Co. (the defendants), that the ship should perform a voyage from London to Callao; that she should receive on board at such loading berth as the charterers might appoint all such lawful goods as might be required; that the whole ship should be at the disposal of the charterers for the conveyance of goods, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect remain responsible to all whom it might concern, as if the ship were loaded in her berth by and for the owners independently of the charterers; that the master was to sign bills of lading at any rate of freight the charterers might require without prejudice; that the ship should be addressed to the charterers' nominees at the port of discharge; that the ship, being loaded, should proceed to Callao, and deliver the cargo agreeably to bills of lading in the usual and customary manner, the act of God, &c., excepted; the total freight for the use and hire of the ship, 2500*l.*, to be paid as follows, against captain's order, viz., by charterers' acceptances payable at ninety days from the ship's final sailing from Gravesend, or in cash at 5*l.* per cent. discount at captain's option. But the owners to accept in satisfaction of freight all bills of lading bearing freight payable abroad, not exceeding one-third of the amount of the charter. The charterers' liability, except for freight, to cease on the vessel being loaded."

The plaintiffs shipped on board the *F. K. Dumas* 750 tons of cement and 250 tons of stone, two boats, and a bundle of oars, for which the master signed bills of lading "to be delivered at Callao unto order or their assigns on paying freight of the goods 786*l.* 17*s.* 6*d.*"

The half freight, minus 5 per cent. discount, amounting to 780*l.* 6*s.* 1*d.* was paid by the plaintiffs to the defendants, leaving the bill of lading freight to be paid at Callao.

The vessel, in prosecuting her voyage, was compelled to put in at Monte Video, where she was condemned, and the goods shipped by the plaintiffs sold by the master, it being impossible to forward them to their destination. On these facts the jury, under direction of the learned judge, found that the master was

1880

WAGSTAFF v. ANDERSON.

not justified in selling the goods, and assessed the damages at 1445*l.* The learned judge, after further consideration, directed judgment to be entered for the defendants, on the ground that the master in selling the goods was not acting as the servant or agent of the defendants, and that therefore they were not liable.

From this judgment the plaintiffs appealed.

Feb. 27, 28. *W. Williams, Q.C., A. L. Smith,* and *Hollams,* for the plaintiffs, contended that, under the document of the 26th of June, the defendants contracted with them to carry the goods to Callao; that the bill of lading was at most evidence of a contract, and that it did not in any way supersede the contract of the 26th of June, but carried out its intention, and operated only as an acknowledgment that the master should not retain the goods for a sum beyond the bill of lading freight; that the defendants, by virtue of the documents of the 25th and 26th of June, were the owners of the ship for the voyage, and the master must be deemed to have been their agent; the defendants, therefore, having contracted to carry the goods to Callao, as an incident of the contract had undertaken to take care of the goods on the voyage, perils of the sea only excepted; that if the vessel became unable to prosecute her voyage, the obligation to take care of them did not cease; the master was bound not to sacrifice the goods entrusted to him; they were not of a perishable nature, and there was no necessity to have sold them; and he being the defendants' agent, the defendants were liable.

March 1. *Butt, Q.C., Cohen, Q.C.,* and *J. C. Mathew,* for the defendants, contended that, on the true construction of the documents of the 25th and 26th of June, the contract to carry was with the shipowners, and that the contract of the 26th of June was made by the defendants, not on behalf of themselves, but for the shipowners—at all events the contract was at an end when the goods were received on board the ship; that the master was the servant and agent, not of the defendants, but of the shipowners.

The cases cited were those mentioned in the judgment of the Court.

BRAMWELL, L.J. I am of opinion that the judgment of

Denman, J., ought to be affirmed. The first ground on which it must be affirmed is one which has scarcely been mentioned, but which has occurred to me. The document of the 26th of June, 1872, is on the face of it an agreement by Moss & Mitchell, acting not on behalf of themselves but "acting for the owners of the *F. K. Dumas*." In some cases it has been held that the description "as agent" is not conclusive against personal liability, although the signature has been professedly "as agent," but I think that those cases cannot be applicable to one of this kind. Moss & Mitchell are shipbrokers, and shipbrokers usually do not act for themselves; it then becomes manifest upon the face of this agreement that Moss & Mitchell are not professing to bind themselves, but are acting for the owners of the *F. K. Dumas*. I know that the document contains a clause that the barges, as they come alongside, shall be discharged immediately within the usual seventy-two hours, or Moss & Mitchell undertake to pay the demurrage, but I think that means Moss & Mitchell, acting as agents, undertake. As they are not principals, the only action that could be maintained against them would be that they professed to have an authority which they really did not possess. An agent who has no authority to make contracts cannot be sued as a principal. This is not one of those contracts in which there is a personal consideration; it is not as if the contract was, "I will deliver to you a quantity of coals for my principal:" in that case nothing turns upon the liability of the principal, and the character of the principal; but it is a different thing where the agent pledges the ship and the credit of the shipowner from where he pledges his personal liability. It seems to me, therefore, that the document, on the face of it, purports not to bind the defendants as principals, but purports to bind the ship.

It is said that the defendants are acting for the ship and shipowners, and that an action could be maintained against them if it turned out that they had some interest which might have enabled them to enter into a contract to carry. I think it is impossible to hold, on the face of this agreement, that they in any sense undertook that they would carry.

If, however, even that difficulty were got over by the plaintiffs, the defendants, at all events, are entitled to say, "What have we

1880

WAGSTAFF v. ANDERSON.

Bramwell, L.J.

undertaken to do that we have failed to do?" The agreement states, "It is this day mutually agreed between Moss & Mitchell, acting for owners of the *Francis K. Dumas*, and Thomas Brassey & Co. (meaning thereby the plaintiffs), that the former," that is the owners of the ship, "shall receive on board, in the London Docks, 1000 tons of cargo, as a certain rate of freight, from London to Callao." They have done so. "The ship to receive the cement, &c., on or about the 25th of July, and to sail on or about the 25th of August." Then there is this stipulation, "The barges as they come alongside shall be immediately discharged, say within the usual seventy-two hours, or Moss & Mitchell undertake to pay demurrage on barges." If Moss & Mitchell had not had authority to enter into that stipulation possibly as to that the plaintiffs might have said, "You have no authority to bind your principals to the entirety of this agreement, we will have nothing to do with it, and we will bring an action against you for representing that you had authority;" but I am inclined to think they had authority because they were shipbrokers, and they might specify the time within which barges should be unloaded. Further than that, no difficulty has arisen in consequence of that clause. Then the agreement goes on, "The cargo to be received at Callao as customary; freight to be paid as follows," and so forth. Every word of that agreement has been complied with by the defendants. I cannot see, therefore, that the plaintiffs can have any right to maintain the action, which is an action whereby they say—setting out in their statement of claim the charterparty, because unless they did they could not contend that this was a contract by the defendants to carry—"The defendants thereupon for the purposes of loading the ship at freights to be paid to them, and of making profit out of the said ship, put the said ship up as a general ship to convey goods on the voyage as aforesaid, and contracted with the plaintiffs amongst other persons as follows," then they set out that letter, and they say, "The said defendants entered into the said agreement on their own behalf and for their own purposes, and not for the shipowners as therein alleged." I think they can have no possible right to state that. But it is said on behalf of the plaintiffs, to whom is the freight payable? My answer to that is that the freight is payable to the shipowners. Then this difficulty

was put: supposing the plaintiffs, when the ship had got out to Callao, had refused to receive the goods and pay the freight, who could have maintained an action against them? My answer to that is, the shipowners could have maintained the action, and it was intended that the shipowners should maintain the action. It is true that the freight the shipowners received would be something other than that which the freighters would pay, but that was matter of arrangement between the shipowners and the defendants, and although I do not like to invent trusteeships, I do not think that any necessity for that exists here, because they have so arranged the figures as far as this particular lot is concerned—at least, I suppose they have—one does not know the whole of the story about the other goods which may have been sent out—that the only persons who have any interest in the receipt of these bills of lading are the shipowners, so that there is no necessity to invent what otherwise there would be no difficulty in inventing, a supposed trusteeship. I say no difficulty in inventing, because if it should turn out that the shipowners received over the lump freight, why then it would be a matter of arrangement between them and the charterers, the defendants, that they should pay it over.

I desire to say that I have not the slightest misgiving as to the propriety of *Colvin* v. *Newberry*. (1) I think it was rightly decided. I do not think that because a bill of lading is signed by the captain as agent for the ship, a contract is made between the shipowner and the freighter, the freighter having previously arranged with the charterer that the charterer shall carry his goods. I think that the remedy of the freighter would be against the charterer with whom he made the contract of affreightment, and that he would not get an additional remedy because he had taken a bill of lading from the shipowner. It is sometimes said a bill of lading contains a contract. Such is the language of the Act of Parliament, 18 & 19 Vict. c. 111, and in many instances it is accurate enough, but to say that it is a contract superseding, adding to, or varying the former contract under the charterparty, is a proposition of law to which I never can consent.

I am by no means clear that if this contract to carry had been

(1) 1 Cl. & F. 283.

1880

WAGSTAFF v. ANDERSON.

Brantwell, L.J.

between the charterers and the plaintiffs, the charterers would have been liable for the misfeasance of the captain, although acting within the scope of his authority, in such a way that the owners would have been bound. I express no opinion on the subject. It might be that the owner, as was held in *Ewbank* v. *Nutting* (1), is liable to the shipper, but it may be also that he would be liable to the charterer, the charterer being bound, in the interest of those with whom he had entered into some contract of affreightment, to seek his remedy against the owner or captain, or both, and then to account to those with whom he had entered into some contract, though not liable as he is sought to be made here, as though the misfeasance had been his or his agent's act within the scope of his authority. I give no opinion upon that at all. Upon the other ground I think the judgment should be affirmed.

BAGGALLAY, L.J. I agree in thinking that the judgment of Denman, J., should be affirmed.

The first question is, what were the relations between the plaintiffs and the defendants? The answer to that question depends upon what is the construction which ought to be put upon the agreement of the 26th of June, 1872. That agreement taken by itself appears to me to be nothing more than an agreement entered into by the loading brokers on behalf of the owners of the ship, whoever those owners may be, and, so far as there was any contract entered into by the defendants as regards their own acts, I think that that contract is limited in the manner expressed by Denman, J., in the Court below. He said: "It appears to me that it (the document of the 26th of June) merely amounts to a contract that the owners of the ship shall receive the goods on board and enter into contracts by bills of lading to carry them at certain rates of freight; and that the ship shall sail on or about a certain day named; and that the defendants will pay certain demurrage if the barges are delayed." (2)

If there is any latent ambiguity arising out of the terms in which the contract is expressed, I think, directly we look at the letter of the 24th of June, which preceded that contract, we have the strongest evidence that the contract was only intended to be

(1) 7 C. B. 797.

(2) 4 C. P. D. at p. 289.

a broker's contract, for it was on one of the printed forms used by the shipbrokers, and was addressed to the brokers of the shipper, and merely amounted to an offer of room for a certain amount of tonnage at a certain freight. If that is the true construction of the contract, what rights have the plaintiffs in respect of it if there has been any breach? If the contract was not authorized by the owners, their rights would simply be an action for damages in respect of the misrepresentation. It could in no respect have the effect of putting the defendants into the position of owners of the ship, so as to make them responsible for the acts of the master; and, as regards that particular part, if it did amount to a contract on the part of the defendants that they would receive the goods in the sense I have just referred to, it is not suggested that they ever committed a breach of any undertaking on their part.

Then it is said on the part of the plaintiffs, construing that as a contract on behalf of the owners, having regard to all the circumstances of this case, and to what had taken place between the shippers and Moss & Mitchell and Anderson & Co., they had become quasi owners, that is, owners of the ship for this particular voyage, and that therefore the contract of the 26th of June, which was a contract entered into by them on behalf of the owners, was a contract entered into on their own behalf, and in respect of which they are liable. I think that the terms of the charterparty entirely negative any such idea. The effect of the charterparty is, that the shipowners accept from the brokers a lump sum of 2500*l.* in respect of the freight which was to be earned upon this particular voyage, leaving the shipbrokers to make a profit or sustain a loss according to the actual return which should be made, and in every other respect leaving the owners and the master of the ship to act as if there had been no arrangement come to.

It appears to me, therefore, that the contention that the defendants are to be considered as the true owners of the ship, and as the persons who are to be sued under the agreement of the 26th of June, 1872, must fail.

THESIGER, L.J. I am also of opinion that the judgment of Denman, J., must be affirmed.

The plaintiffs contend that the defendants are responsible for

1880

WAGSTAFF v. ANDERSON.

Thesiger, L.J.

the act of the master of the ship in selling the goods at Monte Video on the grounds, that the master in selling was the agent of the defendants, that being agent of the defendants he was acting within the general scope of his authority, and that consequently, although in this particular case the sale was and has been found by the jury to be unjustifiable, yet the defendants are responsible for the act of their agent upon the principle laid down in *Ewbank* v. *Nutting* (1) and similar cases. This contention involves several propositions. The plaintiffs have to make out that the master was the agent of the defendants, and I am of opinion that in this they have failed. The goods, the sale of which is the subject of dispute, were carried under a bill of lading, and primâ facie the master in signing that bill of lading would be acting on behalf of the persons who were the shipowners, and the shipowners would be the persons responsible for the carriage of the goods, and for all things to which the agent would be able to bind the shipowners in connection with the goods. But it is open to the plaintiffs to negative the presumption of the liability of the shipowners in two ways—either by showing that the transactions between the shipowners and the defendants were such as really put the defendants for that particular voyage in the position of the shipowners, according to the principles laid down in *Colvin* v. *Newberry* (2), or that, although the transactions between the shipowners and the defendants did not put the defendants in the position of shipowners, yet they had so conducted themselves, or so contracted with the shippers of the goods, as to make themselves personally responsible.

First, have the plaintiffs made out that as regards the real transaction between the shipowners and the defendants, the defendants for the purposes of this particular voyage were put in the position of the shipowners? I think that they have not. There are no doubt expressions in the charterparty—for instance, the paragraph which speaks of the use and hire of the ship, and the paragraph which speaks of the whole of the ship being at the disposal of the freighters for the conveyance of the goods—which taken by themselves would seem to involve the idea that the defendants for the particular voyage were to be put into the

(1) 7 C. B. 797. (2) 1 C. & F. 283.

position of the shipowners; but when the whole document is examined it is apparent that that was not the intention of the parties. There is one clause in the agreement which distinctly negatives the idea that the defendants were to be put into the position of the shipowners, I mean the clause which provides that the master and owners of the said ship shall give the same attention to the crew, and shall in every respect be and remain responsible to all whom it may concern, as if the said ship were loaded on the berth by and for the account of the said owners independently of this agreement, and then at nearly the close of the charterparty there is a provision, which perhaps taken by itself would not necessarily negative the liability of the defendants as shipowners, but is very important in favour of the view of the defendants when read with the clause to which I have just referred; being the provision, "That the charterers' responsibility under this charterparty, except for freight as provided, shall cease on the vessel being loaded."

What, shortly, is the meaning of that document? We have in this case foreign shipowners. They have their ship in the port of London, and are anxious to obtain a full cargo for that ship. They deal with a London firm of shipbrokers, men to whose responsibility they may very well look, and they might reasonably argue, "There is a real risk if we put up our ship as a general ship of not obtaining a full cargo, but if we can get a shipbroker of responsibility to guarantee us a certain lump freight, he taking the chances of filling up the ship in such a way as to get a freight beyond that lump freight, we shall be quite ready, for that lump freight, to come under all the responsibilities and liabilities which shipowners ordinarily come under." That seems to me—apart from any question of custom which has not been proved—to be a reasonable agreement, and one which, judging from its language, the parties contemplated and entered into. That disposes of the point as to whether the real transaction was such as to substitute the defendants for the shipowners.

But, secondly, the defendants might have so conducted themselves and so contracted with the shipowners as to take upon themselves the responsibilities of a shipowner. I think they have not done so. Moss & Mitchell themselves were shipbrokers

1880

WAGSTAFF v. ANDERSON.

Thesiger, L.J

on whose behalf jointly with Anderson & Co. the charterparty was executed by Anderson & Co.; and undoubtedly if the letter of the 24th of June is to be looked at as part of the contract between the parties, that letter very strongly shews that Moss & Mitchell were not acting on their own behalf, but were acting as brokers for the ship and for the shipowners; at the same time we have no right to look at that letter if the agreement or the arrangement of the 26th of June, 1872, was a complete contract for carriage. We could only then use the previous letter as possibly explaining some latent ambiguity in the agreement; but I am of opinion that this agreement of the 26th of June, 1872, does not constitute a complete contract for carriage. It constitutes an arrangement under which Moss & Mitchell dealing with the plaintiffs provided for the goods being received on board with the intention common to both parties, and to be collected from the language used, that when the goods were received on board they should be carried in the ordinary way in which goods are carried under a bill of lading, which, although not absolutely the contract, is at all events evidence of a contract by the shipowners under which the goods are carried. It seems to me immaterial to decide whether this document signed as it is absolutely by Moss & Mitchell, although in the body of the document they speak of themselves as acting for the owners, does or does not bind them. The matter may be put thus: If it binds them, it binds them to nothing which happens after the goods have been received on board. If it does not bind them *cadit quæstio*. Therefore, it comes to this, that the goods were not carried under any contract under which Moss & Mitchell, or Anderson & Co., were personally liable, but were carried under the bill of lading signed in the ordinary way by the captain of the ship, and binding as between the plaintiffs and the shipowners, whose captain he was.

It appears to me clear that the master in whatever he did at Monte Video, was not acting for the defendants, and did not render them responsible.

Judgment affirmed.

Solicitors for plaintiffs: *Parker & Co.*

Solicitors for defendants: *Hollams, Son, & Coward.*

MIDDLETON AND OTHERS *v.* SIMPSON. 1880 *Feb.* 25.

Municipal Corporation—Town Councillor—Qualification of—"Entitled to be on" Roll—5 & 6 Wm. 4, c. 76, s. 28—"On" Roll—38 & 39 Vict. c. 40, s. 1, sub-s. 2.

To be eligible for the office of town councillor, a candidate must be "entitled to be on" the burgess roll within 5 & 6 Wm. 4, c. 76, s. 28, as well as "on" the roll within 38 & 39 Vict. c. 40, s. 1, sub-s. 2, and the burgess roll containing his name is not conclusive evidence that he is "entitled to be on" the roll.

SPECIAL CASE stated by the commissioner appointed to try an election petition, against the return of the respondent as town councillor for a ward in the borough of Liverpool. At the trial of the petition it was proved that the respondent was enrolled on the burgess list and roll for the borough and ward, which came into operation on the 1st of November, 1879, in respect of a dwelling house in the ward as a burgess for the borough and ward.

The petitioners proposed to prove at the trial (amongst other things) that the respondent was not qualified to be on the burgess list or roll, because he had never occupied the dwelling house.

It was contended on behalf of the respondent that the burgess list and roll were conclusive that he was entitled to be on the burgess list of the borough, within the meaning of the Act of Parliament in that behalf. The commissioner held that the list and roll were not so conclusive and found, and determined as a fact, that the respondent had never occupied the house as required by the Act in that behalf, and was therefore not duly qualified to be on the list or roll, or a burgess or councillor of the borough.

Under the 15th section of the first mentioned Act, at the request of the respondent, the commissioner reserved for the opinion and determination of this Court the question of law, whether the burgess list and roll were conclusive.

If answered in the affirmative, a certificate would be given that the respondent was duly elected, if in the negative a certificate would be given that he was not duly elected, and that the election was void.

1880

MIDDLETON v. SIMPSON.

Gully, Q.C. (*Edward Pollock*, with him), for the respondent. The name of the respondent is on the register, which is conclusive: *Stowe* v. *Jolliffe.* (1)

By 5 & 6 Wm. 4, c. 76, s. 28, no person shall be qualified to be elected councillor of any borough who shall not be entitled to be on the burgess list, nor unless he shall be seised or possessed of property or be rated to a certain amount. By 32 & 33 Vict. c. 55, s. 1, occupation of premises and residence for a year within the borough entitles persons to the municipal franchise, and by s. 3, any such occupier rated as in the Act mentioned, shall be entitled to be elected a councillor if resident within fifteen miles of the borough, although by reason of his residence beyond seven miles of the borough he is not entitled to be on the burgess roll, provided he is otherwise qualified to be on it. 38 & 39 Vict. c. 40, s. 1, sub-s. 2, enacts that, "Every person nominated shall be enrolled on the burgess roll of the borough, or a person whose name is inserted in the separate list at the end of the burgess roll as provided by s. 3 of the Act 32 & 33 Vict. c. 55 and shall be otherwise qualified to be elected." The fact of being on the register is a qualification unless the candidate is personally disqualified. Under 5 & 6 Wm. 4, c. 76, s. 28, if he could shew that he was "entitled to be on" that was sufficient: *Reg.* v. *Dixon* (2); *Whalley* v. *Bramwell.* (3) Now, he must shew that he is "on" the roll and that is sufficient.

In *Ex parte Hindmarch* (4) a motion for a quo warranto against a town councillor on the roll was made on the ground that he was not duly qualified; the Court refused the rule; but there the application was too late. It was too late in *Ex parte Birkbeck.* (5)

[GROVE, J. Blackburn, J. in that case seemed to think the roll was not conclusive.]

But 38 & 39 Vict. c. 40, prescribes an entirely fresh qualification, and practically repeals s. 28 of 5 & 6 Wm. 4, c. 76. *Stowe* v. *Jolliffe* (1) was a decision on 35 & 36 Vict. c. 60, s. 10, which enacts that "Subject to the provisions of this section a register shall for all purposes be conclusive as to the right of persons

(1) Law Rep. 9 C. P. 734.
(2) 15 Q. B. 33.
(3) 15 Q. B. 775.
(4) Law Rep. 3 Q. B. 12.
(5) Law Rep. 9 Q. B. 256.

included therein to vote," and in 35 & 36 Vict. c. 33, the Ballot Act, 1872, the register is made conclusive as to the right to vote. So also 35 & 36 Vict. c. 66, s. 1, the Corrupt Practices (Municipal) Act, s. 10. If any limit to the conclusiveness had been intended the legislature would have expressly prescribed it.

Channell (*W. R. Kennedy*, with him), for the petitioners. The candidate for office of a town councillor must be entitled to be on the roll. The fact of his merely being on it is not sufficient qualification. It has been admitted that this was so prior to 38 & 39 Vict. c. 40. 5 & 6 Wm. 4, c. 76, s. 53, imposes a penalty on any person acting as councillor, without being duly qualified, and 6 & 7 Wm. 4, c. 104, provides that notwithstanding anything in the said Act contained, no person enrolled on the burgess roll and who shall act as councillor shall be liable to a penalty for so acting on the ground that he was not entitled to be on the burgess list. But, if the argument for the respondent were correct, that provision which is in effect that though still disqualified, yet being on the list, he shall not be liable to the penalty for acting, would be unnecessary. By 7 Wm. 4, and 1 Vict. c. 78, the time for applications for a quo warranto against the alderman, which was the mode of questioning his title, was limited to twelve months after his election, "or the time when the person .... shall have become disqualified." Such an application was made, *Ex parte Birkbeck* (1), more than twelve months after the alderman had become disqualified, and the Court said the qualification of an alderman was not the being on the burgess roll, but the being entitled to be on the burgess list, and that as he had ceased to be entitled to be on there could be no rule.

[He was stopped.]

Gully, Q.C., in reply. That case was prior to 38 & 39 Vict. c. 40. Quo warranto is abolished. So how can the respondent be irremovably on the burgess list, and yet not be entitled to be on? The question is not whether he was entitled to get on it, but whether on the 1st of November, 1879, he was on the list.

LORD COLERIDGE, C.J. I think our judgment must be in favour of the petitioners. A town councillor must be on the

(1) Law Rep. 9 Q. B. 256.

1880

MIDDLETON v. SIMPSON.

borough list. The argument is, that the fact of his being on the list precludes all inquiry into his title to be on it. Of the Acts cited two only, viz., 5 & 6 Wm. 4, c. 76, and 38 & 39 Vict. c. 40, need now be considered. 5 & 6 Wm. c. 4, 76, s. 28, enacts that a person, in order to be qualified to be elected town councillor, must be entitled to be on the register. But Mr. Channell pointed out other sections to shew that being "on" and being "entitled to be on" the register were different things; that being "on" relieved from penalties, yet the very fact of a provision relieving from penalties having been inserted in the Act shewed that in the contemplation of the legislature being "on" the list was not conclusive proof that the person was "entitled to be on" the list, for otherwise, as the learned counsel truly said, a provision to relieve from penalties one who was entitled to be on the list would be otiose and worthless. Such was the state of things when 38 & 39 Vict. c. 40, was passed. No alteration as to the qualification of town councillors had been made in the interval as regarded the borough list. 38 & 39 Vict. c. 40, s. 2, enacts that every candidate nominated for the office of town councillor "shall be enrolled on the burgess roll of the borough . . . and shall be otherwise qualified to be elected." The argument of the petitioner is, that although the earlier Act of 5 & 6 Wm. 4, c. 76, is not in terms repealed, yet that it is impliedly repealed, and that by enacting, in 38 & 39 Vict. c. 40, s. 2, that a municipal candidate must be "enrolled" on the burgess list, whereas in the earlier Act he is to be "entitled to be on" the list, the legislature means by implication that, whether entitled or not, the fact of his being on the burgess list will suffice. Enough to say in answer, that there is no necessary contradiction between the enactments, because the earlier Act saying that he must be "entitled to be on," and the later Act saying that he must be "on," may well be read together, the one saying that he must be qualified, the other saying that the qualification must take the form of the placing of his name on a particular roll. I think there is no necessary contradiction between the words of the Acts, and that if the sections stood alone they might be read cumulatively as my Brother Grove has suggested. But that argument seems much strengthened by several other considerations. First, the qualification of

burgessess has been dealt with by an intermediate Act, 32 & 33 Vict. c. 55, and s. 9 of 5 & 6 Wm. 4, c. 76, which deals with the qualification of burgesses, has been in terms repealed, and another section of 32 & 33 Vict. c. 55, has been enacted in place of it. But there has been no such corresponding legislation on s. 28 of 5 & 6 Wm. 4, c. 76, which deals with the qualification of town councillors and aldermen. That affords a strong argument to prove that s. 28 is left unrepealed and untouched. If it had been intended to alter s. 28 by the later Act, 38 & 39 Vict. c. 40, I should have expected to find, and probably should have found, the obvious course adopted of repealing s. 28 and setting out clearly and distinctly the qualification of aldermen and town conncillors. Nothing of the kind is done. But, further, it appears to me that our construction derives great force from the different language of s. 5 which deals with voters, and enacts in terms that a person on the burgess list shall vote, and that a person not on the burgess list, whether entitled to be on or not, shall not vote. The legislature thereby shews when it intends to make the roll conclusive, and does so in apt terms by s. 5, for the purposes of voting. It is there conclusive and conclusive adversely to persons who may be entitled, and perhaps conclusive in favour of those not entitled to vote. Our construction derives irresistible force from the decision in *Ex parte Birkbeck* (1), in which not only was the question as to the distinction between being "entitled to be on" and being "on" the list, a question which arose in the case, but it was the question which was the ratio decidendi, and Blackburn, Quain and Archibald, JJ., held distinctly that under the old law, not repealed by 38 & 39 Vict. c. 40, it was the existence of the right to be on the burgess roll, and not the fact of being on it, which was to be considered in regard to the right of town councillors. Having before me that authority, with which I entirely agree, I think the respondent was not entitled to be on the roll, and not being so, was not entitled to be elected. The question put to us must be answered in the negative.

GROVE, J. I am of the same opinion. I think that when examined, the enactment, may receive a consistent interpretation.

(1) Law Rep. 9 Q. B. 256.

1880

MIDDLETON v. SIMPSON.

In the Acts of Wm. 4, 35 & 36 Vict. c. 60, and 38 & 39 Vict. c. 40, there are distinct provisions relating to candidates and to voters in boroughs. 5 & 6 Wm. 4, c. 76, s. 28, enacts that no person shall be qualified to be elected, or to be a councillor or an alderman of any such borough "who shall not be entitled to be on the burgess list of such borough." That relates to the person qualifying to be elected. Section 29 relates to the voter, and for him enrolment on the burgess roll is enough. "Every burgess of any borough who shall be enrolled on"—not "entitled to be enrolled on"—"the burgess roll . . . . shall be entitled to vote in the election of councillors . . . . and no person who shall not be enrolled in such burgess roll . . . . shall have any voice or be entitled to vote in any such election." Coupling that section with the decisions in *Whalley* v. *Bramwell* (1) and *Ex parte Birkbeck* (2) with which I entirely agree, it appears that it was enough for the candidate that the person should be entitled to be on the roll; and that, as to a voter, on being once enrolled, his qualification shall not be inquired into. Then in the Corrupt Practices Act (35 & 36 Vict. c. 60), which applies to voters, a similar provision is made, and there are distinct provisions with respect to the qualification of persons who are candidates for election and who are voters. The same distinction is, in 38 & 39 Vict. c. 40, kept up as to voters, for in s. 5 the roll is conclusive as to persons entitled to vote; and then comes sub-s. 2 of s. 1, as to candidates. So we find the distinction preserved between the qualification to vote and the qualification to be nominated or elected. The learned counsel for the respondent cannot shrink from the contention that sub-s. 2 of s. 1 of 38 & 39 Vict. c. 40, does to a considerable extent repeal s. 28 of 5 & 6 Wm. 4, c. 76, and that being on the roll, whether qualified or not, he is entitled to the office. I think no words in the Act imply that. All that the later Acts do is to add to the qualification of being entitled to be on the roll the condition that he shall be enrolled. By such construction every word may be given its full meaning, and there may be very good reason for the legislature thinking that, to avoid difficulties, they should add to the earlier qualification that not only should the candidate be qualified, but that he should also

(1) 15 Q. B. 775. (2) Law Rep. 9 Q. B. 256.

be on the roll. This is further borne out by s. 5 of 38 & 39 Vict. c. 40, which does not use the words of s. 1, sub-s. 2, that every person nominated shall be enrolled, "and shall be otherwise qualified to be elected." The words are not "shall be otherwise qualified personally," or in some other respect. That is strengthened by s. 12 of 38 & 39 Vict. c. 40. "The several Acts of Parliament mentioned in the second schedue to this Act shall be repealed to the extent specified in the third column of such schedule." Turning to that column we find, under the head "Extent of Repeal" of 5 & 6 Wm. 4, c. 76: "So much of section 47 as relates to the fixing of the day of election by the alderman."

Therefore the Act is not repealed, except as to part of s. 47, and remains in force; and there is nothing in 38 & 39 Vict. c. 40, which, either directly or impliedly, repeals it, for the requirement that the candidate shall be on the roll is perfectly consistent with the requirement that he shall be qualified to be on. But s. 13 adds force to the argument by providing that "This Act shall, as far as consistent with the tenor thereof, be construed as one with the Act 5 & 6 Wm. 4, c. 76, and the Acts amending the same." So that, in fact, incorporates the Act of Wm. 4 with this Act. It appears to me that sub-s. 2, which can reasonably and consistently be construed with s. 28, "shall be construed as one with that Act."

The words in which Blackburn, J., commenced his judgment in *Ex parte Birkbeck* (1), saying that there must be no rule, the disqualified alderman "ceased to be entitled to be on the burgess list more than twelve months ago," also tend to support our judgment.

LINDLEY, J. I am of the same opinion. I need not refer to all the Acts, but only to the two on which the case principally turns, viz., 5 & 6 Wm. 4, c. 76, s. 28, and 38 & 39 Vict. c. 40, s. 1, which, as my Brother Grove pointed out, is to be read with the first so far as it is consistent with it. Sect. 28 of 5 & 6 Wm. 4, c. 76, certainly contains words which have given rise to difficulty and doubt. It enacts that no person shall be qualified to be

(1) Law Rep. 9 Q. B. 256.

1880

MIDDLETON v. SIMPSON.

elected, or to be a councillor, or an alderman, "who shall not be entitled to be on the burgess list." What does that mean? It may mean and obviously does include the case of a person not on but entitled to be on the list. That point was raised and disposed of in *Whalley* v. *Bramwell*. (1) Then the question is whether "not be entitled to be on" is a phrase used by way of contrast to being "on," and is to be taken irrespective of his being on or off? He may be "on," yet "not entitled to be on." The difficulty is removed by contrasting the language of s. 28 with that of s. 29, and all further difficulty is removed by *Ex parte Birkbeck* (2), which is conclusive. As the learned counsel for the respondent pointed out, the passage in the judgment of Blackburn, J., who says that the qualification of an alderman is "not the being on the burgess list, but the being entitled to be on the burgess list" is really the ratio decidendi. It shews that the fact of being on is not conclusive of the title to be on, but that his title to be on must be regarded. That is, I think, the true construction of s. 28 of 5 & 6 Wm. 4, c. 76. 38 & 39 Vict. c. 40, s. 1, sub.-s. 2, shews that now it is not enough to be on but that the person must be entitled to be on. The question is whether that has altered the expression, "entitled to be on," which is in 5 & 6 Wm. 4, c. 76, s. 28. There is nothing inconsistent in holding the provisions to be cumulative, and I think we ought so to hold. The two provisions can well be construed together, and my construction is the same as that given to them by my Brother Grove. With respect to the words "and shall be otherwise qualified to be elected," there may be a question whether they apply to persons on the roll at all and do not apply to the fifteen mile list only. But this does not affect the present question. There is no section throughout the Acts cited which does not rather fortify that weaken our construction of them.

Judgment for the petitioners.

Solicitors for petitioners: *Field, Roscoe, & Co.*
Solicitor for respondent: *E. W. Owles.*

(1) 15 Q. B. 775.

(2) Law Rep. 9 Q. B. 256.

IN RE WEST BROMWICH SCHOOL BOARD. 1880 *April* 26.

Elementary Education—Election—School Board—33 & 34 *Vict. c.* 75, *ss.* 31, 33—*Ballot Act*, 1872 (35 & 36 *Vict. c.* 33)—*Elementary Education Amendment Act*, 1873 (36 & 37 *Vict. c.* 86), *s.* 26, *Sched.* 2—*Corrupt Practices* (*Municipal*) *Act*, 1872 (35 & 36 *Vict. c.* 60), *s.* 2.

By the Elementary Education Act, 1870, s. 33, questions as to the right of any person to act as a member of a school board may be inquired into by the Education Department. A petition against his election cannot be sustained under the Corrupt Practices (Municipal) Act, 1872, for although the provisions of the Ballot Act, 1872, have been applied to school board elections by the Elementary Education Amendment Act, 1873, s. 26, sched. 2, the provisions of the Corrupt Practices (Municipal) Act, 1872, have not been applied to such elections, notwithstanding the terms of s. 2 enacting that this Act shall, so far as is consistent with the tenor thereof be "construed as one" with the Acts relating to boroughs and elections in boroughs.

MOTION for an order that a petition against the election of certain members of the West Bromwich School Board be taken off the file of the Court, on the ground that such petition was not authorized by the Corrupt Practices Act, 1872, under which it purported to have been lodged.

A. Wills, Q.C. (*Anstie*, with him), in support of the motion. The proceedings are misconceived. 33 & 34 Vict. c. 75 (Elementary Education Act, 1870), s. 31, provides that mayors shall hold the school board elections, and s. 33 prescribes the mode of questioning the result of such elections, viz., by inquiry before the Education Department. There are two remedies which may be adopted. One an inquiry under s. 33; the other by quo warranto. 36 & 37 Vict. c. 86 (Elementary Education Amendment Act, 1873), s. 26, declares that the schedules to this Act shall be of the same force as if they were enacted in the body of this Act, and the second schedule of "Rules respecting election of members of a school board" provides that "any poll shall, so far as circumstances admit, be conducted in like manner in which the poll at a contested municipal election is directed by the Ballot Act, 1872, to be conducted, and subject to any exceptions or modifications contained in any order of the Education Department made in

1880

RE WEST BROMWICH SCHOOL BOARD.

pursuance of this Act, the Ballot Act, 1872, shall apply in the case of the election of a school board in like manner as if the provisions thereof were herein enacted with the substitution of 'school board election' for 'municipal election.'" And 35 & 36 Vict. c. 33 (Ballot Act, 1872), Part II. s. 20, enacts that "The poll at every contested municipal election shall, so far as circumstances admit, be conducted in the manner in which the poll is by this Act directed to be conducted at a contested parliamentary election." So the regulations of the Ballot Act are applied to the polling at school board elections; but the provisions of the Corrupt Practices Act have not been applied so as to give a remedy by petition against such elections.

[He was stopped.]

Jeune, shewed cause. The validity of school board elections may, no doubt, be questioned by means of proceedings under s. 33 of 33 & 34 Vict. c. 75. But the mode of inquiry therein prescribed is not the only one which may be adopted. The Ballot Act, which applies to municipal and parliamentary elections, is incorporated with the Elementary Education Amendment Act, 1870, so far as regards school board elections. Then by 35 & 36 Vict. c. 60 (Corrupt Practices (Municipal) Elections Act, 1872), s. 2: "The Act shall so far as is consistent with the tenor thereof be construed as one with the Acts for the time being in force relating to boroughs and to elections in boroughs." "Construed as one" means that provisions applicable to a municipal election shall be applicable to a school board election. The area of election and persons electing are the same in both cases, and probably the legislature intended the same provisions to regulate both.

LORD COLERIDGE. I am of opinion that the petition must be taken off the file, as this mode of correcting mistakes under the Elementary Education Act is misconceived. The Elementary Education Act, 1870, contains certain provisions as to school boards, and s. 33 enacts that, "In case any question arises as to the right of any person to act as a member of a school board under this Act"—that can only be after election,—"the Education Department may, if they think fit, inquire into the circum-

stances of the case, and make such order as they deem just for determining the question, and such order shall be final unless removed by writ of certiorari during the next term after the making of such order." Such was then clearly the state of the law; there was to be an election in a certain form, and the mode of questioning that election was to be by appeal or petition before the Education Department.

At that time the Ballot Act had not passed, but it did so in 1872, and in 1873 an Elementary Education Amendment Act passed, and then, as the Ballot Act had been applied to parliamentary and municipal elections, the legislature thought it wise to apply the Ballot Act to school board elections also, and directed that polls should be taken and the provisions of the Ballot Act should apply as regards nominations and proceedings to election, as if, in fact, the Ballot Act had been part of the Elementary Education Act, 1873. In the Amendment Act, the Elementary Education Act is dealt with in great detail, and there are a number of sections of the Elementary Education Act repealed. But amongst them s. 33 was not included, and it stands as before. The argument for the petitioners is, that an Act which says that polls shall be subject to the Ballot Act, and that the Ballot Act shall apply to them, means that the Corrupt Practices Act shall apply, and that the Ballot Act, 1872, shall be read as if the Corrupt Practices Act, 1872, was in that section.

But the Ballot Act and the Corrupt Practices Act were distinct enactments. They were passed at nearly the same time, and would both be plainly within the purview of the legislature when framing the Elementary Education Amendment Act, yet in that Act the legislature carefully points out and refers to the Ballot Act, and carefully omits and makes no reference to the Corrupt Practices Act.

It is said that the Corrupt Practices Act is one, because it is to be "construed as one," with the Acts for the time being in force relating to boroughs and to elections in boroughs. I can only meet the argument by saying that those words do not mean that. The Act says that the Ballot Act shall apply, and does not say that the Corrupt Practices Act shall apply, to school board elections.

1880

RE WEST BROMWICH SCHOOL BOARD.

GROVE, J. I am of the same opinion. I had some difficulty about the words "as one," and have still some doubt as to the meaning of them; but s. 33 is unrepealed, and I think that school board elections must be questioned by the means it prescribes.

Rule absolute.

Solicitors for petitioners: *Doyle & Son.*
Solicitor for respondent: *Frith Needham.*

March 2.

MACALLISTER *v.* THE BISHOP OF ROCHESTER AND OTHERS.

Church—Parish—Chapel within—Endowed and Consecrated—Right of presentation to—14 & 15 Vict. c. 97, s. 11—Notices thereunder—Patron and Incumbent—Acquiescence—Estoppel.

Practice—Procedure—Third Parties—Order XVI., rr. 18, 20, 21—Discovery to Plaintiff.

15 C.L.D. 163, 5 Asp. Cas. 493, 49 L.T. 208

1. Claim: That the plaintiff was vicar of a parish; that a chapel was erected within it, and endowed and consecrated for the administration of the sacraments and the performance of all other divine offices according to the rites of the Church of England; that the plaintiff as such vicar was entitled to nominate and present, and had nominated and presented, a clerk to the chapel, but another clerk had been licensed, instituted, and admitted by the defendant bishop on the nomination and presentation of certain other defendants, who thereby hindered the plaintiff in the exercise of his right; and he claimed to have his right established and declared.

Defence of the last-mentioned defendants: That certain freeholders had erected the chapel and conveyed it to the Ecclesiastical Commissioners, and applied to them under 14 & 15 Vict. c. 97, to declare the right of nomination to be in the defendants who had endowed the chapel, and that before making such declaration a copy of the application was according to the Act sent by the Commissioners to the plaintiff, he being both patron and incumbent of the parish; that if he had ceased to be patron he stood by and knowingly allowed those defendants to endow the chapel and procure the same to be consecrated in the belief entertained by them as he well knew that he was patron, and that the sending of such copy to him was in fact a sending of a copy both to the patron and incumbent, as required by the Act, and the plaintiff was therefore estopped from denying that he was patron; and that the right of nomination had been declared to be in those defendants, who afterwards nominated.

On demurrer to the allegation of estoppel:—

Held, that it was bad, because the rights of the vicar were not merely private but were accompanied by spiritual and other duties in which his parishioners were interested, and he could not therefore waive or divest himself of those rights and duties by the conduct imputed to him.

But *held*, also, that the claim was bad, inasmuch as it did not allege that the

chapel was a chapel of ease, or otherwise shew any right in the vicar to nominate and present a clerk to it.

2. The defendants claiming relief over against the Ecclesiastical Commissioners served upon them a notice under Order XVI. rule 18. They entered an appearance under rule 20, and an order was afterwards made at chambers under rule 21 that they should be at liberty to appear and defend this action, so far as related to the question whether all things required to be done by them, in order to enable them as against the plaintiff to make a valid declaration of the right of nomination and to vest that right in the defendants, were done by them, and that they should be bound by the finding upon that question. The plaintiff then obtained an order on the Ecclesiastical Commissioners for discovery of documents:—

Held, that the third parties having appeared in the action to litigate with the plaintiff, he was entitled to discovery from them, and the order for it was right.

Claim: The plaintiff was the vicar of the parish of Plumstead, in the county of Kent.

In 1863 certain persons erected a building or chapel called the church of St. James, within the parish.

On the 31st of July, 1878, an endowment fund for the same having been provided towards the maintenance of the minister, the church or chapel was without the plaintiff's consent consecrated by the defendant Bishop of Rochester (in whose diocese the parish of Plumstead was situate) for the administration of the holy sacraments and the performance of all other divine offices according to the rites of the Church of England.

No agreement had been made or consent given by the plaintiff affecting his rights as vicar.

The plaintiff as vicar was entitled to nominate and present a fit clerk to officiate in the church or chapel, and was further entitled to require the bishop to license, institute, and admit such clerk, nominated and presented as aforesaid, to the church or chapel, and to do all things necessary in order to such licensing, institution, and admission.

In pursuance of such right, the plaintiff accordingly, on the 20th of December, 1878 (the church or chapel being then vacant), duly nominated and presented to the defendant bishop, the Reverend George MacDonnell, clerk, Bachelor of Arts, being a fit and proper person in that behalf, requesting the bishop to license the said George MacDonnell to minister and officiate in the church or chapel, and to institute and admit him thereto, and cause him to be inducted into the same with all its rights, members, and

1880

MACALLISTER v. BISHOP OF ROCHESTER.

appurtenances, and to do all things necessary in order to such licensing, institution, and admission. The bishop thereupon refused so to do, and unjustly hindered the plaintiff in the exercise of his right, to his damage.

The bishop, in violation of the plaintiff's right without his consent, licensed, instituted, and admitted the defendant the Reverend Stilon Henning, clerk, to the church or chapel, on the pretended nomination and presentation of the defendants Carus Venn, Holland, Auriol, and Cadman, who claimed the right to nominate and present a clerk to the church or chapel and claimed to have lawfully nominated Stilon Henning thereto, and thereby hindered the plaintiff in the exercise of his right, &c.

Stilon Henning claimed to have been lawfully instituted and admitted, and thereby hindered the plaintiff, &c.

The plaintiff claimed—

1. To have established and declared his right to nominate and present a fit clerk, and to have such clerk licensed to officiate therein, and instituted and admitted to the church or chapel, and the rights and appurtenances thereof.

2. To have George MacDonnell duly licensed and admitted as aforesaid by the bishop.

3. Damages for being hindered as aforesaid in the exercise of his right.

DEFENCE of the defendants, other than the bishop and Stilon Henning: The plaintiff was not vicar.

The building or chapel was erected in 1855 by the freeholders of the land upon which it was erected and at their expense.

In 1876 they proposed to the Ecclesiastical Commissioners to convey to them the building or chapel and land for the purpose of having the same consecrated as a church, and then, to the satisfaction of the commissioners, and in manner in 14 & 15 Vict. c. 97 directed, to endow, or procure to be endowed, the building or chapel, and provide a competent fund for the repair of the same, and that thereupon the commissioners should make such declaration of the right of nomination as is hereinafter mentioned, and such proposal was accepted by the commissioners, and thereupon afterwards the freeholders conveyed to them the building, or chapel, and the land, and then to the satisfaction of the commis-

sioners procured to be endowed the building, or chapel, and provided a competent fund for the repair of the same.

4. The whole of such endowment was in fact provided at the request of the freeholders by the defendants, other than the bishop and Stilon Henning and the commissioners, out of funds belonging to them, and such conveyance was made, and such endowment and repairing fund were provided by the several parties making and providing the same on the terms and with the intention and on the faith that the right of perpetual nomination of a minister to such church or building should and would be vested in the defendants other than the bishop and Stilon Henning and the commissioners, and should not nor would be vested in the plaintiff or in any person whatsoever other than these defendants.

Before the making of any such declaration of the right of nomination by the commissioners, such application was made to them by the freeholders, and by all other persons in any way contributing to or providing the endowment and repairing fund, and each of them, as in the statute required, containing such information and particulars as therein provided; and a copy of such application, containing the like information, was, according to the true intent and meaning of the statute, sent by the commissioners to the plaintiff, then being both patron and incumbent of the parish of Plumstead. If the plaintiff was not then the patron as well as incumbent of the parish, which the defendants did not admit, he was in fact the duly constituted agent of the patron, authorized by him to receive the copy, not only on his own behalf, but also on behalf of the patron, as the copy required by the statute to be sent to the patron, and the sending of the copy to the plaintiff was a sending of a copy of such application both to the patron and incumbent within the true intent and meaning of the statute, and the patron then had notice of the sending thereof to the plaintiff, and then and more than three months before the declaration by the commissioners of the right of nomination hereinafter mentioned had due notice of the contents thereof and of the said intended endowment and provision of the repairing fund.

6. Before the sending of the copy of such application to the plaintiff, the plaintiff had been, and at the time of so sending it

1880

MacAllister v. Bishop of Rochester.

he was believed by the commissioners and by the defendants still to be both the patron and incumbent of the parish, and the commissioners and these defendants had not, nor had any or either of them, any notice or knowledge that he had ceased to be such patron, and the commissioners, in sending the copy to the plaintiff, accompanied it by a letter then addressed to and received by the plaintiff, in which they stated that they sent the same to him as the patron and also as the incumbent of the parish, and the plaintiff did not then or at any time inform the commissioners or these defendants or any of them, nor had they or either of them, before the endowment or consecration of the church, any notice or knowledge that he had ceased to be, or that he was not, the patron of the parish. The plaintiff had notice of the facts stated in this statement of defence, and he stood by and knowingly allowed these defendants to endow the church and procure the same to be consecrated as hereinafter mentioned in the belief then entertained by them, as the plaintiff well knew, that the copy had been duly sent to him not only as incumbent but also as patron of the parish, and that he was such patron, and that the sending of such copy to him was in fact a sending of a copy both to the patron and incumbent as required by 14 & 15 Vict. c. 97, s. 11. If, in fact, the plaintiff was not patron, which the defendants did not admit, or if the sending of the copy was not a sending of a copy to both patron and incumbent within the meaning of the Act, which the defendants also did not admit, the plaintiff was, for the reasons in this paragraph appearing, estopped from denying that he was patron, or that the sending of the copy to him was not a sending to both patron and incumbent as required by the statute, and he ought not to be allowed to set up that he was not the patron or that a copy was not duly sent to both patron and incumbent.

The commissioners, by instrument under seal, did, with the consent of the bishop, declare the right of nomination to be in the other defendants, who afterwards nominated and presented Stilon Henning.

Any nomination or presentation alleged to have been made by the plaintiff was void.

Reply: 1. Issue. 2. Demurrer to the 6th paragraph of the

defence, on the ground that it disclosed no legal or equitable defence to this action.

Nov. 17, 1879. *Arthur Charles, Q.C.* (*Hugh Cowie*, with him), for the plaintiff. The chapel having been built and consecrated within the parish, the plaintiff, as vicar of the parish, has a right to nominate and present a clerk to it: 1 Stephens on the Clergy, p. 261; Rogers' Ecclesiastical Law, 2nd ed. p. 141, note; 2 Phillimore's Ecclesiastical Law, p. 1181. The defendants have interfered with that right by nominating and presenting another clerk. Therefore this action, which is in the nature of quare impedit, lies: *Rex* v. *Bishop of Chester* (1); *Rex* v. *Marquis of Stafford*. (2) As the chapel is endowed, and there are cross-nominations, the bishop is not bound to decide which of the contending parties may have the better title, and he is neutral, and has, by judge's order, been relieved from pleading in the action. Therefore, so much of the claim as was inserted on account of the bishop, is not now before the Court.

The defendants can only establish their alleged right to nominate by shewing that the provisions of the statute 14 & 15 Vict. c. 97, have been complied with. But the Act provides that notices of any application to the Ecclesiastical Commissioners for a declaration of the right to nominate, shall be given both to the patron and incumbent of the parish. The object of the notice is that they may have an opportunity for criticism and objection. The provision is for the benefit of the public, the patron, and incumbent of the parish, who are interested in the matter and whose rights may be affected thereby. The notices are, therefore, conditions precedent: *Williams* v. *Brown* (3), and the right of nomination cannot be acquired unless they are performed. Due notice has, however, not been given to the patron. The defendants plead an equitable plea of acquiescence by the plaintiff; but such statutory requirements cannot be waived by mere acquiescence: see per Sir John Nicholl, *Bliss* v. *Woods*. (4) Moreover the parishioners and future vicars are interested in the right of

(1) 1 T. R. 396.
(2) 3 T. R. 646.
(3) 1 Curt. 53.
(4) 3 Hagg. 486, at p. 514.

1880

MACALLISTER v. BISHOP OF ROCHESTER.

nomination, and their interests cannot be affected by any such acquiescence as is alleged.

Dixon, for the defendants. First. The claim itself is bad. It has the appearance of a quare impedit, but is not one. Quare impedit is an action for an advowson or next presentation: see Com. Dig. tit. Pleader (3 I 4). That the bishop should, as the plaintiff says, be out of the case, is inconsistent with an action of quare impedit, in which the bishop is usually one of the defendants, although he now stands indifferent between the active litigants. Quare impedit being for an advowson, which is an incorporeal hereditament, is analogous to an action for recovery of land, which is a corporeal hereditament. No right to maintain quare impedit is shewn in the claim. The plaintiff claims a right, simply as vicar of the parish, to present to this living. But such right is in those who endow the church: 1 Co. Inst. 17 b, 119 b, "The building and endowing of the church was what at Common Law originally entitled the patron to the patronage," per Lord Macclesfield, C.: *Herbert* v. *Dean and Chapter of Westminster*. (1) No case can be cited to shew that the right is in the incumbent of the parish, although his consent may be necessary to enable a clergyman to officiate within it. The curate being as it were the servant of the vicar, must be licensed by him. And the incumbent may even present to a chapel of ease which is a mere excrescence of the mother church: *Parish of Ashton* v. *Castle Birmidge Chapel*. (2) If this building be a mere chapel of ease, let the plaintiff go and preach there, or license a curate to do so, and should he be excluded, obtain a mandamus, as was done in *Rex* v. *Blooer*. (3) This building is like the proprietary chapel in *Gardner* v. *Ellis* (4), and not connected with the parish church as in *Attorney-General* v. *Brereton* (5), nor is it such a chapel of ease as in *Dixon* v. *Metcalfe*. (6)

In *Herbert* v. *Dean and Chapter of Westminster* (1) the Lord Chancellor says: "Suppose I build a chapel in my house for myself or my next neighbour, can the parson name one to preach

(1) 1 P. Wms. 773, at p. 774.
(2) Hob. 66.
(3) 2 Burr. 1043.
(4) Law Rep. 4 Ad. & E. 265.
(5) 2 Ves. Sen. 425.
(6) 2 Eden. 360; Amb. 528.

there? I think not; and it will make no alteration, if the chapel which I build in my own ground be intended for the use of twenty neighbours besides my own family." Moreover, in that case "the dean and chapter were spiritual persons possessing the same rights pleno et utroque jure, which the monks and abbots had done before. They were actual incumbents, and served the church and chapels of St. Margaret by one of their own body, and were in that character entitled to nominate": per Lord Stowell, *Duke of Portland* v. *Bingham*. (1)

No instance is to be found of a quare impedit in respect of a chapel of ease. In *Rex* v. *Bishop of Chester* (2) the Court said only that the curacy was a donative, it was admitted that quare impedit would lie, and therefore a mandamus would not be granted. Nothing was decided as to the rights of the vicar. In *Rex* v. *Marquis of Stafford* (3) the Court said, either that the applicant had a legal remedy by quare impedit, and therefore could not claim a mandamus, or they had an equitable right and had come to the wrong Court to enforce a trust. The chapel there was purely donative, and not a mere stipendiary curacy.

There is no allegation in the claim that the chapel here has been dedicated to the public or the township. There is a distinction between a chapel so dedicated and a mere proprietary chapel, which "can possess no parochial rights; and the exercise of such rights would be mere usurpation in view of the law": per Sir John Nicholl, *Moysey* v. *Hillicoat* (4); and see *Farnworth* v. *Bishop of Chester* (5); per Holroyd, J.; and *Bosanquet* v. *Heath* (6), where, however, the chapel was not consecrated; it should have been: Burns' Eccles. Law, 9th ed. p. 276.

Secondly. The defence is good. Paragraph 4 is of itself an answer to the action. Paragraph 6 is a valid plea of acquiescence by the plaintiff which has estopped him from setting up the right he claims: *Savage* v. *Foster*. (7) "The circumstance of looking on is in many cases as strong as using terms of encouragement": per Lord Eldon, C.J., *Dann* v. *Spurrier*. (8)

(1) 1 Hagg. Consist. 157, at pp. 168, 169.
(2) 1 T. R. 396.
(3) 3 T. R. 646.
(4) 2 Hagg. Eccl. R. 30, at p. 46.
(5) 4 B. & C. 555, at p. 573.
(6) 9 W. R. 35.
(7) 9 Mod. 35; 2 Wh. & T. L. C. 5th ed. 620.
(8) 7 Ves. 231, at p. 236.

1880

MACALLISTER v. BISHOP OF ROCHESTER.

Lastly. Public policy is not opposed to such a defence. The provisions first made in 5 Geo. 4, c. 113, and now by 14 & 15 Vict. c. 97, are solely for the benefit of the incumbent, and to protect his private rights.

Charles, Q.C., replied. First. The vicar has a right to nominate a clerk to this chapel: *Dixon* v. *Kershaw*. (1) The fact of the chapel in that case being called a chapel of ease makes no difference. It was an endowed chapel to which the parishioners had nominated on four previous occasions. They met and elected the plaintiff the vicar, and the parish afterwards nominated the defendant to officiate, and Lord Northington, C., said, "It is undoubted law, that whenever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister, unless there is a special agreement to the contrary, which gives a compensation to the incumbent of the mother church," p. 532. The law may once have been uncertain. "But the balance of authority is greatly in favour of the incumbent, and it is, since the case of *Dixon* v. *Kershaw* (1), considered as settled in favour of the incumbent;" per Sir William Scott: *Duke of Portland* v. *Bingham* (2); *Farnworth* v. *Bishop of Chester*. (3)

[GROVE, J. As you cannot compel the bishop to license a mere curate the plaintiff's claim here must amount to a quare impedit.]

He can maintain such an action. The right of nomination to many unendowed chapels is in the vicar. So to a curacy endowed. Then, as by virtue of the endowment it has become a presentation benefice, quare impedit is the correct form of action for interference with the right of nomination, although in case of a mere curacy unendowed mandamus would be the only proper remedy: see, per Lord Ellenborough, C.J., *Rex* v. *Archbishop of Canterbury and the Bishop of London* (4) and *Rex* v. *Blooer* (5).

Secondly. It is evident from the record that this chapel is consecrated for public worship and not for private use.

Thirdly. The doctrine of acquiescence does not apply to this case, where a public statute prescribes conditions precedent which must be strictly performed. The vicar could not by such acquies-

(1) 2 Amb. 528.
(2) 1 Hagg. Cons. 157, at p. 168.
(3) 4 B. & C. 555.
(4) 15 East, 117, at p. 145.
(5) 2 Burr. 1043.

cence as is alleged prejudice or waive rights in the maintenance of which his successors and parishioners are interested.

Cur. adv. vult.

Nov. 24, 1879. Grove, J. After reading the statement of the claim, said: Amongst other pleas is the sixth. It is in effect a plea of estoppel. [The learned judge read it.] The demurrer was to that plea, and it has been argued that this is not a case of acquiescence such as when parties sue in their individual capacity for private property, and the fact of their standing by, and allowing money to be expended on it on the faith of that standing by, is held to amount to a kind of equitable license. This claim is in respect of a public matter, and not only the plaintiff but the parish was interested in it. We are of opinion that if the case rested on that ground alone the plaintiff would be entitled to succeed, and that he is not estopped. The learned counsel for the defendants, however, fell back on an objection to the statement of claim and contended that it was insufficient, and that the plaintiff, under the circumstances, although he may have a right to present a clerk to be licensed, or may have the negative power to prevent any one else officiating, has shewn no right to have his nominee instituted or admitted or inducted as the permanent or perpetual clerk or minister. We are of opinion that this argument is well founded, and that will be the judgment of the Court.

Lindley, J. The plaintiff does not ask for any injunction to restrain the nominee of his opponents from officiating, but he asks to have it established and declared that he has himself a right of presentation to this chapel. The whole object of this action is that, and the question is whether he has shewn sufficient to entitle him to succeed.

The plaintiff as vicar of Plumstead is entitled to forbid any person to officiate in his parish in any public church or chapel consecrated by the bishop for public worship according to the doctrines and rites of the Church of England, unless the plaintiff has been deprived of such right by some statute or some arrangement assented to and binding on the bishop of his diocese, the patron of the mother church, and the incumbent thereof.

1880

MACALLISTER v. BISHOP OF ROCHESTER.

Moreover, if a chapel of ease were to be erected in his parish, the plaintiff, as vicar, would be entitled, with the sanction of the bishop, to appoint a curate to officiate in it, and if such chapel were endowed the plaintiff, as vicar, would be entitled to present a duly qualified minister to such endowed chapel. *Dixon* v. *Kershaw or Metcalfe* (1), *Farnworth* v. *Bishop of Chester* (2), *Bliss* v. *Woods* (3), are authorities for these propositions. [The learned judge here read the judgment of Abbot, C.J., in *Farnworth* v. *Bishop of Chester* (2), from p. 568, l. 5, to the end.] In *Farnworth* v. *Bishop of Chester* (2) the Court had not however to decide what we have now to determine. We are asked to go a step further, and to say that the vicar had a right to present a clerk to this chapel. But we find no authority for holding that the vicar of a parish is entitled, as such, to present to any consecrated chapel in his parish unless such chapel is a chapel of ease. The passage in Co. Lit. 109 b, and the opinion of Lord Macclesfield in *Herbert* v. *Dean and Chapter of Westminster* (4) are entirely opposed to the existence of any such right. The Dean and Chapter were ultimately successful there, but they were in a very different position from the plaintiff, as pointed out in the *Duke of Portland* v. *Bingham.* (5)

In order therefore to entitle the vicar of Plumstead to present to the chapel in question in this action he must shew that the chapel is a chapel of ease. This he has not done. He does not in his statement of claim even allege that the chapel is a chapel of ease; nor has he stated any facts from which it can be inferred to be such a chapel. From the third paragraph in the statement of claim it is to be gathered that the chapel was consecrated in order that, inter alia, sacraments and burials might be administered and performed there. This shews that the chapel is not a mere chapel of ease; for a mere chapel of ease is only for prayers and preaching: 1 Burns Eccl. L. p. 299; *Attorney-General* v. *Brereton.* (6) The chapel as described in the statement of claim appears to be an endowed parochial chapel, and although such a chapel may be a chapel of ease (see Burn, ubi supra) there is no

(1) 2 Amb. 528; 2 Eden. 360.
(2) 4 B. & C. 555.
(3) 3 Hagg. Eccl. 509–513.
(4) 1 P. Wms. 774.
(5) 1 Hagg. Cons. 168.
(6) 2 Ves. Sen. 427.

presumption that it is so; there is no presumption therefore that the vicar is entitled to present to it.

The plaintiff's title as disclosed in his statement of claim rests upon the assumption that the plaintiff, as vicar of Plumstead, is entitled to present a proper person to any endowed consecrated chapel in the parish unless the contrary can be shewn. This, in our opinion, is a mistake. We are of opinion that the plaintiff must shew something more to entitle him to present; he must shew that the chapel is a chapel of ease, or that for some other reason he is entitled to present to it. The statement of defence, if that can be looked at for this purpose, shews that the chapel was not erected or consecrated with the intent that it should become a mere chapel of ease in any sense dependent on the mother church. The object of those who erected and endowed the chapel was wholly different; and although by not observing the provisions of the statute the founders may not yet have acquired all the rights they expected (see *Williams* v. *Brown* (1)) we are not aware of any law which makes the chapel a chapel of ease, or confers the right to present to it upon the plaintiff in spite of their intentions and wishes. In *Dixon* v. *Kershaw* (2) the chapel, although not originally intended to be a chapel of ease, had in some way become so, and had been consecrated as a chapel of ease; and the decision in favour of the vicar's right of presentation is rested entirely on this ground; and, moreover, in that case there was no controversy between the vicar and the founders and their heirs or assigns, but only between the vicar and the inhabitants of the parish. In *Farnworth* v. *Bishop of Chester* (3) the chapel was not consecrated as a chapel of ease in so many words; but all the rights of the vicar were reserved; and the decision was that the founders had no right to present to the chapel without the vicar's consent. The Court did not there determine that the vicar had himself the right of presentation to the chapel; and Abbott, C.J., and Bayley, J., expressly said that the Court had not to determine that the vicar had any such right. In this case the plaintiff may be entitled to prevent the nominee

(1) 1 Curt. 53. (2) 2 Amb. 528; 2 Eden. 360.
(3) 4 B. & C. 555.

1880

MacAllister v. Bishop of Rochester.

of the founders from officiating in the chapel without his consent until the provisions of the 14 & 15 Vict. c. 97, ss. 7, 11, are duly complied with; and *Farnworth* v. *Bishop of Chester* (1) and *Williams* v. *Brown* (2) are authorities to shew that on the facts stated in the pleadings he is so entitled. But neither these cases, nor any other that we can find, shew that the vicar has acquired the right which he claims in this action. Treating this action as a quare impedit, and assuming that quare impedit would lie for a chapel of this kind, the plaintiff cannot sustain such action on the facts stated in his claim: for no seisin of the advowson of the chapel is shewn in the plaintiff: see Com. Dig. Pleader, 3 I. 4. The cases of *Rex* v. *Stafford* (3) and *Rex* v. *Bishop of Chester* (4) are in no way inconsistent with this view, for they merely shew that, if there is a seisin, quare impedit is the proper remedy and not mandamus. But, after all, this is only repeating in technical language the objections already pointed out as fatal to the plaintiff's claim. This being our opinion, it hardly becomes necessary to deal with the plaintiff's demurrer to the 6th paragraph of the statement of defence. But if the plaintiff had shewn a good title to present to the chapel, we do not think the facts set out in the 6th paragraph of the defence would be an answer to his claim. A vicar's rights are not mere private rights which can be waived or renounced at his own will and pleasure; they are accompanied by important spiritual and other duties, in the performance of which all his parishioners are interested; and he cannot divest himself of these duties, or of the rights which accompany them, by any such conduct as is imputed to him. We think, therefore, the well-known principles of equity on which the defence set up is based is not applicable to a case of this description. To hold the contrary would lead to great practical inconvenience, and would only postpone the decision of the present controversy to the next avoidance of Plumstead church. The plaintiff's successor would not be affected by the plaintiff's conduct. If, therefore, there had been nothing else in the case, we should have allowed the plaintiff's demurrer to this 6th paragraph of the statement of

(1) 4 B. & C. 555.
(2) 1 Curt. 53.
(3) 3 T. R. 646.
(4) 1 T. R. 396.

defence. On the ground, however, that the plaintiff has shewn no title to present to the chapel, we give judgment for the defendants with costs, with liberty to the plaintiff to amend his statement of claim.

Judgment for the defendants, with costs.

March 2. Appeal from chambers.

The defendants had served a notice under Order XVI., rule 18, on the Ecclesiastical Commissioners who entered an appearance in the action within eight days according to rule 20; the defendants thereupon applied for directions under rule 21, and upon hearing counsel for the plaintiff, the defendants and the Ecclesiastical Commissioners, a master ordered that the Ecclesiastical Commissioners should be at liberty to appear and defend the action, so far as related to the question whether all things required to be done by the commissioners, in order to enable them, as against the plaintiff, to make a valid declaration of the right of nomination, and to vest that right in the defendants (other than the bishop, the defendant Stilon Henning, and the commissioners) were done by them, and that they should be bound by the finding upon that question. The order was affirmed on appeal by Pollock, B.

The plaintiffs having afterwards obtained from Field, J., an order on the Ecclesiastical Commissioners, as third parties, for discovery of documents,

Lumley Smith, for the third parties, moved to rescind that order.

The Ecclesiastical Commissioners are in the position of defendants sued by the defendants only: Judicature Act, 1873, s. 24, sub-s. 3. See *Treleven* v. *Bray* (1); *Padwick* v. *Scott*. (2) The rules are in more restricted terms than those of s. 24: Wilson's Judicature Acts, 2nd ed. p. 22. The plaintiff does not sue the Commissioners, and objects to their coming into his action. He can obtain no judgment or redress against them. They are not parties to the action. The form of the order is adapted from that in *Benecke* v. *Frost*. (3) But the mere verbal form of the order does not render the commissioners defendants as against the

(1) 1 Ch. D. 176. (2) 2 Ch. D. 736.

(3) 1 Q. B. D. 419.

1880

MACALLISTER v. BISHOP OF ROCHESTER.

plaintiff. He is not litigating with them, and is not entitled to discovery from them: Day's Common Law Procedure Acts, 4th ed. p. 298.

Hugh Cowie, for the plaintiff. By Order XXXI., rule 12, "any party" may apply for an order "directing any other party to the action" to make discovery of documents. The Ecclesiastical Commissioners are in the position of parties to this action. The word "party" in the former Procedure Acts necessarily meant either the plaintiff or defendant, but other litigants, styled third parties, are now known to the law. By the Judicature Act, 1873, s. 24, sub-s. 3, every person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing, as in the present case, "shall henceforth be deemed a party to such cause or matter." The rules, however, are not, it must be admitted, quite so wide. "The object of these enactments was to prevent the same question being tried twice over, where there is any substantial question common as between the plaintiff and defendant in the action, and as between the defendant and a third person; and in such case the third person is to be cited to take part in the original litigation, and so to be bound by the decision on that question once for all": per Jessel, M.R., *Swansea Shipping Co.* v. *Duncan.* (1)

The commissioners need not have appeared to the notice given under Order XVI., rule 18. But they chose to appear under rule 20, which provides that if a person, not a party to the action, who is served as mentioned in rule 18, desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance. They desire to dispute the plaintiff's claim, and have appeared and made themselves parties to litigate with the plaintiff the same question as that between him and the defendants, viz., whether everything was done necessary to vest the right of patronage in them. Not only have the commissioners appeared in the action, but at chambers on the summons to rescind the order for directions, and they got their costs of that appeal.

They are litigating with the plaintiff, and have rights against him, and he has a correlative right to discovery from them.

(1) 1 Q. B. D. 644, at p. 649.

Lumley Smith, in reply. The Ecclesiastical Commissioners merely appeared to see that the defendants duly defend the action. Persons brought in by notice are in s. 24 not termed parties to the action, but merely to the cause or matter in respect of which relief is sought. It must, however, be admitted that s. 100, the interpretation clause which enacts that "party" shall include every person served with notice of or entitled to attend any proceeding, although not named on the record, seems opposed to this argument.

LINDLEY, J. The object of the notice served under Order XVI., rule 18, on the Ecclesiastical Commissioners was, that in the event of the plaintiff succeeding against the defendants in the action, the defendants might be in a position to call upon the Ecclesiastical Commissioners to restore to them the endowment paid for the benefit of the chapel. It is obviously of some importance to the defendants that the right of the plaintiff should be decided in the presence of the Ecclesiastical Commissioners; they have obtained the advantage in this sense, viz., that the land has been conveyed to them under the Church Building Act, and they hold as trustees for somebody or other. The Ecclesiastical Commissioners having been served with the notice may take one of two courses; they may disregard it, in which case they will be bound as between the plaintiff and defendants in that action; but they have taken the other alternative pointed out in rule 20 of Order XVI., which provides that "If a person not a party to the action, who is served as mentioned in rule 18, desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance in the action within eight days from the service of the notice." The Ecclesiastical Commissioners have done so. What was their object? Evidently to dispute the plaintiff's claim in the action as against the other defendants. Under these circumstances one would suppose that they had elected to make themselves parties litigating not only with the defendants, but with the plaintiff, their object being to defeat the plaintiff and thereby, of course, put an end to all question as to the endowment. They elect to take up that position.

1880

MACALLISTER v. BISHOP OF ROCHESTER.

They appear for that and no other purpose. Then by rule 21, "If a person not a party to the action, served under these rules, appears pursuant to the notice, the party giving the notice may apply to the Court or a judge for directions as to the mode of having the question in the action determined; and the Court or judge, upon the hearing of such application, may, if it shall appear desirable so to do, give the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered on such amendments in any pleadings to be made, and generally may direct such proceedings to be taken and give such directions, as to the Court or a judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the person so served shall be bound or made liable by the decision of the question." Under that rule an order is made on hearing counsel for the plaintiff, the defendant, and the Ecclesiastical Commissioners, that the latter be at liberty to defend the action as therein stated. [The learned judge read the order.] The result is that now the action is so constituted that it is competent to the Ecclesiastical Commissioners to defend this action as against the plaintiff, and so protect themselves against any cross-claim by the defendants, and therefore it appears to me that they have a right to obtain discovery from the plaintiff, and that the plaintiff has a similar right against them. They are litigating as the persons referred to in the order of the master. I think that they having appeared for the purpose of litigating with the plaintiff he has a right to treat them as any other defendant in the action, and to obtain an affidavit of documents.

The order for discovery was one which the learned judge was perfectly right in making, and the appeal must be dismissed with costs.

LOPES, J. The question is whether the Ecclesiastical Commissioners are parties to the action within the meaning of the Judicature Acts, Orders and Rules, so as to make them liable to an order for discovery. I think the learned judge at chambers was right in making the order. I am especially led to that conclusion by the words at the end of s. 24 of the Judicature Act, 1873, and

also by the interpretation clause, s. 100, so far as it relates to the words "action" and "party."

Appeal dismissed with costs.

Solicitors for plaintiff: *Hewitt & Alexander.*

Solicitors for defendants: *Sandilands, Humphry, & Armstrong.*

Solicitors for Ecclesiastical Commissioners: *White, Borrett, & Co.*

LORD AVELAND, APPELLANT; LUCAS, RESPONDENT.

1879
Nov. 14.

Steam Engines on Highways—Highways and Locomotives Amendment Act, 1878, (41 & 42 *Vict. c.* 77)—"*Excessive Weight*" *and* "*extraordinary Expenses*," *how ascertained.*

Sect. 23 of the Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), enacts that "where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway, by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person, by whose order such weight or traffic has been conducted, the amount of such expenses as may be proved to the satisfaction of the court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid:"—

Held, that "excessive weight" and "extraordinary traffic" mean excessive and extraordinary with reference to the road itself and the ordinary user of the road, and not with reference to the weight which by the statute may lawfully be imposed upon it.

The appellant employed on a highway a traction-engine drawing two waggons for the carriage of materials and goods used for ordinary purposes on his estate, the combined weight of which engine and waggons when coaled and loaded exceeded twenty-four tons (the engine being of less weight than is allowed by s. 28 of the Highways and Locomotives Amendment Act, 1878, and having its wheels constructed in accordance with the provisions of that section), and thereby did damage to the highway beyond that caused by the ordinary wear and tear:—

Held, that this was "excessive weight" and "extraordinary traffic," the damage caused by which was properly chargeable upon the appellant under s. 23 of the Act.

But, *held*, that "the average expenses of repairing highways in the neighbourhood" was not the proper test of the "extraordinary expenses," though an element to be taken into consideration in estimating such expenses.

CASE stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Oakham an information was laid

1879

LORD AVELAND v. LUCAS.

by Richard Lucas, the surveyor of the highways of the parish of Edith Weston, in the county of Rutland, being the "highway authority" within the meaning of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), against Baron Aveland, reciting that, by the certificate of the said "highway authority," being the authority liable to repair a highway in the parish of Edith Weston, leading from Luffenham to Normanton, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses had been incurred by the highway authority in repairing the highway, by reason of the damage caused by excessive weight passing along the same, and extraordinary traffic thereon, to wit, certain steam locomotive engines drawing trucks laden with bricks, coals, granite, and other materials, and that such excessive and extraordinary traffic had been conducted by the order of Lord Aveland,—and claiming in pursuance of s. 23 of the Act 40*l.* from Lord Aveland, being the amount of the said extraordinary expenses.

The justices adjudged that Lord Aveland should pay to the highway authority of Edith Weston the sum claimed, with costs, and at the request of the defendant stated the following case:—

1. The respondent is a landed proprietor, and the surveyor of highways in the parish of Edith Weston, which parish is not situated within the district of any highway board or of any urban sanitary authority.

2. The appellant is a large landed proprietor, having real estate in the parish of Edith Weston and in the adjacent parishes of North Luffenham and Normanton and in other parishes. Included in his estate are a mansion and grounds where he resides at Normanton, adjoining the parish of Edith Weston, towards the north, and also brick and tile works in the parish of North Luffenham, which last mentioned parish adjoins the parish of Edith Weston towards the south. At these brick and tile works bricks and tiles, drain pipes, and similar goods are and for several years have been manufactured for use on the appellant's estates, and also for sale. These works are connected with the Peterborough and Syston branches of the Midland Railway Company by a siding; and goods made at such works and not used (with other goods) on the appellant's estate as hereinafter mentioned,

are either taken away by purchasers in carts and waggons drawn by horses or are carried away by train from the siding.

3. Prior to the 30th of July, 1877, the mode of conveyance of goods used on the appellant's estate was cartage with horses.

4. On the 30th of July, 1877, the appellant first used a traction engine, which with the waggons thereto has since been used for traffic between the North Luffenham railway station and various parts of the appellant's estates. In going to and from the railway station the traffic has been in part over the highway in the parish of Edith Weston. Since the 5th of February, 1878, the appellant has used a second traction engine for similar purposes and upon the same roads. These engines usually draw two waggons, each of which is capable of carrying six tons. The total weight of the engine and trucks when loaded would be about twenty-four tons.

5. The engines and waggons have been employed solely for the carriage of materials and goods used for ordinary purposes on the appellant's estate, such as, materials for repairing the mansion, farm-buildings, farm-houses, and labourers' cottages, for repairing fences and roads, drain-tiles, fuel, and other similar things.

These engines and waggons have not ever been used for carrying bricks or other things which have been sold by the appellant, or in any way whatever for purposes unconnected with the use and occupation and maintenance or repair of his estate; and all the materials or things carried by them over the road in question would, if the engines and waggons had not been used, have been carried in carts and waggons drawn by horses.

6. The weight of one of the engines was eight and of the other nine tons; or, with coals and water, the weight was nine and ten tons respectively. The weight of each of the waggons was 30 cwt. The tires of the wheels of the engines were 16 inches wide, and the tires of the wheels of the waggons 8 inches wide; and the engines and waggons were constructed and used, according to the evidence of Mr. Aveling, the maker of the appellant's engines and waggons, and of the superintendent of the appellant's agricultural and general works (which was not contradicted), in accordance with the provisions of the Locomotive Acts and the Acts amending the same. According to the evidence the waggons might

1879

LORD AVELAND v. LUCAS.

legally carry 8 tons, but they were so constructed as only to carry 6 tons.

7. The weight of an ordinary agricultural waggon drawn by horses varies from 15 to 25 cwt. The width of the tires is from 3 to 4½ inches. Such waggons carry loads of from two to four tons. Mr. Aveling, the superintendent of the appellant's works, put in the following statement (uncontradicted by the respondent) as a correct calculation of the weight of the engines and wagons mentioned in it:—

Bearing weight upon the road.

(1.) An 8-inch traction-engine with coal and water weighing 9 tons, two-thirds weight upon driving-wheels 16 inches wide,—bearing per inch .. .. 420 lbs.

(2.) An Aveling waggon to carry 6 tons, 1 ton 6 cwt. = 3360 lbs.; tires 8 inches wide .. .. 105 lbs.
Six tons .. 420 „
Total bearing per inch .. 525 lbs.

(3.) A Pickford's spring-waggon to carry 2 tons, weight 1 ton 1 cwt. = 2352 lbs.; tires 2 inches wide .. .. 294 lbs.
Two tons .. 560 „
Total bearing per inch .. 854 lbs.

(4.) A Pickford's spring-waggon to carry 3 tons, weight 1 ton 7 cwt. 2 qrs. = 3080 lbs.; tires 2½ inches wide .. 308 lbs.
Three tons .. 672 „
Total bearing per inch .. 980 lbs.

(5.) A Hayes & Son's waggon to carry 4 tons, weight 1 ton 5 cwt. = 2800 lbs.; tires 4 inches wide .. .. 175 lbs.
Four tons .. 560 „
Total bearing per inch .. 735 lbs.

(6.) A Hayes & Son's waggon to carry 3 tons, weight 18 cwt.; tires 3 inches wide .. .. 168 lbs.
Three tons .. 560 „
Total bearing per inch .. 728 lbs.

Messrs. Hayes & Son are wheelwrights having an extensive business in making waggons and carts and agricultural implements at Stamford, a market-town about eight miles from Edith Weston.

There was no evidence as to the kind of waggons or carts used by the appellant previous to his using the locomotives and the waggons drawn by them.

8. The engines and waggons, in passing between the North Luffenham railway station and the appellant's estate, pass over the highway in the parish of Edith Weston, the length of which is about three quarters of a mile.

9. The total length of the highways in the parish of Edith Weston is 7 miles 6¾ furlongs. The total cost of the repair of the said highways, for the year ending the 31st of March, 1877, was 142*l.* 10*s.* 4*d.*; for the year ending 31st of March, 1878, 144*l.* 0*s.* 9*d.*; and for the year ending 31st of March, 1879, 189*l.* 11*s.* 10*d.*,—being an increase in the latter year of 45*l.*

No separate accounts were kept previous to the passing of the Highways and Locomotives Act, 1878, of the cost of repairs of the highway mentioned in the information, over which the engines and waggons of the appellant pass: but the above-mentioned accounts for the years 1877, 1878, and 1879, of the cost of the repairs of the highways in Edith Weston included the cost of the repairing the highway mentioned in the information.

The accounts as to the year ending 31st of March, 1879, shewed that, out of 225 tons of granite used upon all the highways in the parish of Edith Weston, 102 tons were used upon the highway mentioned in the information; that, of 37*l.* 14*s.* 4*d.*, being the whole cost of the labour expended on all the highways in the parish of Edith Weston, 12*l.* 11*s.* 5*d.* was paid for labour upon the highway mentioned in the information; that the cost of the 102 tons of granite, at 11*s.* per ton, and of the carting of the same to the highway mentioned in the information was 68*l.* 17*s.*; that, out of the 189*l.* 11*s.* 10*d.*, being the total cost of repair of all the highways in the parish of Edith Weston, 81*l.* 8*s.* 5*d.* was the cost of the repair of the highway mentioned in the information.

10. The respondent and his witnesses stated that the additional outlay in the year ending March 31st, 1879, was rendered necessary in consequence of the use of the locomotives, which usually went five times a week along the highway mentioned in the information; that the locomotive cut deep ruts, and spoilt the shape of the road by making the middle part of the road the lowest, when it should

1879

LORD AVELAND v. LUCAS.

be the highest; that the weight of the locomotives being as hereinbefore stated in excess of the weight of an ordinary waggon drawn by horses, made (the respondent and his witnesses contended) the road bulge; that the wheels would bite on and tear up the road and pull great pieces up, and that the ruts required to be constantly filled up or the road would have become impassable; that they did not complain of the goods or materials that were carried by the engines and waggons, but of the mode in which they were conveyed, and of the excessive weight of the engine and trucks and the wheels together. It was the weight of the engine and the bite of the wheels by which they alleged that the damage was done and the additional outlay caused.

It was proved that the roads in Edith Weston were properly constructed, and had been well drained, and were in good condition before the appellant used the engines; and that they were very good previous to last winter, but were much deteriorated since.

11. The expense per mile of repairing highways in the following three parishes in the neighbourhood of Edith Weston and in Edith Weston itself were as follows:—

In the parish of Hambleton, ...	year ending	March 31, 1877	..	£10	13 10
		March 31, 1878	..	10	2 0
		March 31, 1879	..	15	2 6
In the parish of Lyndon, ...	year ending	March 31, 1878	..	8	17 7
		March 31, 1879	..	9	15 4
In the parish of North Luffenham,	year ending	March 31, 1878	..	25	17 6
		March 31, 1879	..	38	2 6
In the parish of Edith Weston, ..	year ending	March 31, 1877	..	18	3 4
		March 31, 1878	..	18	7 4
		March 31, 1879	..	24	3 4

For the year ending March 31st, 1879, the expense of repairing all the highways in the parish of Edith Weston except the highway mentioned in the information was at the rate of 15*l.* 6*s.* 11*d.* per mile. The expense of repairing the last mentioned highway during the same period was at the rate of 102*l.* 7*s.* 2*d.* per mile.

12. Except as aforesaid, there was no evidence to shew which proportion of the expense of repairing the highways in Edith Weston was caused by the appellant's engines and waggons passing along the said portion of the road, nor what part of such expenses

was caused since the passing of the Highways and Locomotives Act, 1878.

13. Evidence was given by the appellant's witnesses to shew that the locomotives did not exceed 9 feet in width, and that they were respectively 8 and 9 tons in weight, and, as before mentioned, constructed and used in accordance with the Locomotives Acts; that the bearing weight per inch of the wheels of the waggons and carts drawn by horses was greater than that of locomotive engines and waggons similar to those of the appellant; that the use of such locomotives and waggons did not cause so much damage to ordinary roads as would be caused thereto by the carriage of the same goods thereover by carts and waggons drawn by horses; that, whether a road be made as an ordinary road in an agricultural district or made as roads are usually made in urban districts, the wear and tear of materials conveyed by locomotives and waggons such as the appellant's would be less than if the same materials were conveyed in waggons and carts drawn by horses; that the injury described as done to the road was in the opinion of the witnesses impossible to have been caused by the locomotives and waggons of the appellant; and that the roads in Normanton parish (1) had cost less in keeping in repair since these locomotives and waggons had been used: but no evidence was given shewing the comparative cost of such last-mentioned roads before and after the user of the locomotives, nor as to the cost of such roads.

14. It was proved that locomotives of much greater weight than those used by the appellant are made, and that some of such locomotives are used largely by government.

15. The following is a copy of the certificate given by the respondent, and produced at the hearing:—

"To the Highway Authority of the parish of Edith Weston in the county of Rutland.

"I, Richard Lucas, of Edith Weston Hall, in the parish of Edith Weston, in the county of Rutland, being the highway surveyor of the said parish, do hereby certify that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses to the extent of 40*l.* have been incurred by the said highway authority in repairing a certain highway in the said parish

(1) An adjoining parish in which the appellant had property.

1879

LORD AVELAND v. LUCAS.

of Edith Weston leading from North Luffenham to Normanton by excessive weight passing along the same and extraordinary traffic thereon, to wit, certain steam locomotive engines drawing trucks laden with bricks, coals, granite, timber, and other materials; and that such excessive weight and extraordinary traffic have been conducted by the order of the Rt. Hon. Baron Aveland. Dated, &c.

(Signed) "Richard Lucas."

16. It was contended on behalf of the respondent that the extra cost of repairing the highways in the parish was caused by reason of the appellant using the said locomotives and waggons on the highway mentioned in the information; and that consequently the respondent was entitled to recover from the appellant the sum claimed in the information under the provisions of the Highways and Locomotives (Amendment) Act, 1878, 40 & 41 Vict. c. 77, s. 23.

17. It was contended on behalf of the appellant that, inasmuch as the weight of the locomotives and waggons was not in excess, but less than the weight authorized by the Locomotives Acts, 1865 and 1878 (viz. 14 tons), it could not be said to be excessive within the meaning of the said section, and that, as they were used by the appellant only for the ordinary purposes of his estate, he was not liable for any sum by reason of the use of such engines and waggons as aforesaid in respect of the expense of repairing the highway; and, further, that, if he was liable at all, there was no evidence to shew what proportion of such expenses was attributable to and chargeable against the use of the said engines and waggons.

18. The magistrates were of opinion that the traffic had been excessive and extraordinary, and that extra expenses had during the year ending the 31st of March, 1879, and since the passing of the Highways Act of the last session, been incurred by the surveyor of the parish to the amount of 40*l.* in repairing the highways in the parish, by reason of the damage caused by the engines and waggons passing along the highway mentioned in the information; and they consequently ordered the appellant to pay the said sum of 40*l.* and costs to the respondent.

If the Court should be of opinion that the increased expenses incurred by the surveyor of the highways, under the circumstances hereinbefore stated, were extraordinary expenses within the meaning of the section, and that there was sufficient evidence of the

proportion of the said expenses attributable to the use of the said engines and waggons, the order was to be enforced. If the Court should be of a contrary opinion, the order was to be quashed, and the information dismissed, with costs.

Herschell, Q.C. (*Graham*, with him), for the appellant. The question turns mainly upon the construction of s. 23 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), which enacts that, "where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway, by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person, by whose order such weight or traffic has been conducted, the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid." What is the meaning of "excessive weight passing along the road," or "extraordinary traffic thereon?" If it means extraordinary quoad the amount of user of the road, that is negatived by the finding in par. 5 of the case, that "the engines and waggons have been employed solely for the carriage of materials and goods used for ordinary purposes on the appellant's estate." If it means extraordinary with reference to the bearing capacity of the road itself, it is answered by the fact that these engines are not in excess of the weights sanctioned by the Locomotives Acts, 1861 (24 & 25 Vict. c. 70), and 1865 (28 & 29 Vict. c. 83). The object of the enactment was to cast upon individuals the expense occasioned by their exceptional user of the road; something beyond what would be ordinarily required to keep the road in proper order. It is common knowledge that from the unusual wetness of the season all roads required extraordinary expenditure to keep them in repair in the year 1879. Sect. 28 of the Act of 1878 contains provisions for the weight of locomotives and the width of wheels,

1879

LORD AVELAND v. LUCAS.

and imposes a penalty for their infringement; and the appellant has not offended against those provisions.

J. Etherington Smith, for the respondent. This is almost exclusively a question of fact, upon which the finding of the justices is conclusive: see *London and North Western Ry. Co.* v. *Wetherall* (1); *West Riding and Grimsby Ry. Co.* v. *Wakefield Board of Health.* (2)

[GROVE, J. The question is what is the meaning of "excessive weight" and "extraordinary traffic" in s. 23 of the Act of 1878. Is it excessive weight with reference to the bearing capacity of the road, or something beyond the ordinary user of the road? A still greater difficulty arises upon the second question,—"was there sufficient evidence of the proportion of the expenses attributable to the use of the appellant's engines and waggons?" I cannot, upon the materials before me, see how the magistrates arrived at the sum of 40*l.*]

If there is any evidence upon which the magistrates could reasonably come to the conclusion they have, the Court will uphold their decision.

Graham, in reply. This is a question of great and general importance. The Locomotives Act, 1861, recites that the use of locomotives is likely to become common on roads, that many of the local Turnpike Acts do not contain provisions for regulating their use or the levying of tolls, that the weighing clauses in the general Turnpike Acts have not been framed in anticipation of such traffic, and it is desirable that the use of locomotives on turnpike roads should be regulated by uniform general provisions, and that tolls should be levied upon such locomotives, &c. It then proceeds to make regulations for, amongst other things, the size and weight of locomotives to be so used. That Act and the Locomotives Act, 1865, were in force at the time of the passing of the Act of 1878, which made further provisions for the same purposes. Extraordinary weight was already provided for; and extraordinary traffic must in construing s. 23 of the Act be estimated with reference to the ordinary and usual traffic at the time the Act paseed. To sustain this conviction, the Court must be satisfied that there was reasonable evidence to shew that the

(1) 20 L. J. (Q.B.) 337. (2) 33 L. J. (M.C.) 174.

increased expense of repairing the road in question was caused by the excessive use of the engines and waggons of the appellant.

GROVE, J. Section 23 of the Highways and Locomotives Act of 1878 (41 & 42 Vict. c. 77) presents some difficulty. It enacts that "where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway, by reason of damage caused by excessive weight passing along the same or extraordinary traffic thereon, such authority may recover in a summary manner from any person, by whose order such weight or traffic has been conducted, the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid." The way the question is left to us is this:—"If the Court shall be of opinion that the increased expenses incurred by the surveyor of the highways, under the circumstances hereinbefore stated, were extraordinary expenses within the meaning of the section,—and that there was sufficient evidence of the proportion of the said expenses attributable to the use of the engines and waggons, the order is to be enforced." I cannot help thinking that the questions intended to be put to us by the magistrates are these,—1. Are these extra expenses incurred by reason of excessive weight or extraordinary traffic upon and over the highway? 2. Have we upon the evidence before us rightly attributed to the use of the locomotives and waggons by the appellant the amount we have assessed as extraordinary expenses? As to the first, I feel no difficulty. But, as to the second, I cannot say, upon the materials presented to us, that 40*l.* was the proper sum to award in respect of such extraordinary expenses. We can only lay down a general principle (upon the construction of the Act) as to how the extraordinary expenses are to be assessed. I think these were extraordinary expenses incurred by excessive weight and extraordinary traffic, so as to give the magistrates jurisdiction to say that the excess

1879

LORD AVELAND v. LUCAS.

should be charged upon the appellant. The amount of the cost of repairs as compared with the cost of repairing other roads in the neighbourhood, does not seem to me to be a correct test, though it may be an element and an important element in the inquiry. I therefore think the case should be remitted to the magistrates with the views of the Court upon the subject, and with a direction to them to endeavour to ascertain the amount of the extra expenses incurred by the highway authority by reason of the excessive weight and extraordinary traffic imposed upon the highway by the appellant, "having regard to the average expenses of repairing highways in the neighbourhood;" not taking that as a test, but not excluding it as an element in the inquiry. If, for instance, during the time the engines were being used, the weather was bad or the road flooded or had been badly formed, the damage complained of might not have been caused by excessive weight or extraordinary traffic at all. The magistrates must take into their consideration these and all other circumstances which may enable them to come to a just and reasonable conclusion, as to whether and to what extent the extraordinary expenses incurred in repairing the highway are caused by extraordinary weight or extraordinary traffic.

As to the construction of the Act, I am of opinion that "extraordinary weight" and "extraordinary traffic" do not mean what the learned counsel for the appellant contended, some extraordinary quantity of traffic caused by the carriage of materials for the building of a mansion; but that "weight" and "traffic" are used with reference to the road itself,—weight and traffic which are abnormal and beyond the ordinary traffic on the road; the weight and character of the traffic, not the amount of user to which the road is subjected. It must be unusual and extraordinary with reference to the particular road, producing an undue effect in damaging the road. Other parts of the Act might be referred to, to shew that that is the true construction of s. 23; and the proviso at the end of that section,—"Provided that any person, against whom expenses are or may be recoverable under this section, may enter into an agreement with such authority as is mentioned in this section for the payment to them of a composition in respect of such weight or traffic, and thereupon the

persons so paying the same shall not be subject to any proceedings under this section,"—tends that way. If the preceding part of the clause had been intended to apply to excessive weight or traffic from unusual circumstances, it is not likely that the legislature would have provided for a compensation. Our attention has been called to s. 28, which regulates the weight of locomotives and the mode of construction of their wheels; and it is said that the engines in question are within the prescribed weight. I do not think that section at all militates against the view I have expressed, but rather strengthens it. If they had meant that provision to apply to the 23rd section, the legislature would have said so,—"by reason of excessive weight beyond the weight permitted by this Act." The limit of fourteen tons prescribed by that section may be exceeded if a licence be obtained.

I am therefore of opinion that the case must go back to the magistrates, with an intimation of our opinion that there is not sufficient evidence to shew that 40*l.* is the correct measure of damage caused by the excessive weight of the engines used by the appellant, though some damage has been caused by them.

LINDLEY, J. I am of the same opinion. The substantial question turns upon the construction of s. 23. The first part of the Act, down to s. 27, relates to the amendment of the highway law. The object of s. 23 is, to compel those who by unusual means cause unusual damage to the highway to pay the excess, and so relieve the ratepayers from an undue burden. We have first to ascertain what is meant by "excessive weight" and "extraordinary traffic." It appears to me that those words must mean excessive and extraordinary with reference to the ordinary use and traffic upon and over the road. If anything is done of an unusual and extraordinary kind, the person doing it must pay for the damage thereby occasioned. It is the ordinary nature of the traffic over the road which is to be the standard. Now, the case shews that the appellant about four or five times a week passed along the road in question with a traction-engine and waggon, the concentrated weight of which when loaded exceeded twenty-four tons. That appears to me excessive weight and extraordinary traffic to impose upon an ordinary highway, utterly regardless of

1879

LORD AVELAND v. LUCAS.

whether or not a locomotive was used, and must cause extraordinary expense. The figures given shew this, but they do not satisfactorily shew the amount. The average expense of the annual cost of repairing the roads in the adjoining parishes is given: but that, though an element in the calculation, is not the sole test. It is said that, in dealing with locomotives, the proper standard of weight is that limited by the 28th section of the Act. That section, however, has a different object altogether: it is found in the second part of the Act, which relates only to the amendment of the Locomotives Acts of 1861 and 1865, and does not alter or modify s. 23. It by no means follows that a compliance with the regulations provided by s. 28 exempts a person from liability to pay the expenses occasioned by excessive weight or extraordinary traffic, under s. 23. The case must go back to the magistrates for the purpose of more clearly stating how they arrived at the amount of 40*l.*

Graham, for the appellant, asked leave to appeal.

GROVE, J. We think it is a fit case for appeal: and, if the parties can agree to abandon the 40*l.* or strike out the second question, we give judgment at once. (1)

Rule accordingly.

Solicitors for appellant: *Whyte, Collisson, & Pritchard, for Allen, Stamford.*

Solicitors for respondent: *Vizard & Crowder, for Owston & Dickenson, Leicester.*

(1) The parties subsequently agreed to reduce the conviction to 20*l.*, and notice of appeal was given.

JAMES, APPELLANT; HOWARTH, RESPONDENT. 1879 Nov. 20.

Parliament—Borough Vote—Notice of Objection—Description of Objector, under 41 & 42 Vict. c. 26—Reference to List—Power of Amendment under s. 28, subs. 2.

A notice of objection was signed "H. J., of 36, New King Street, on the list of voters for the parish of W." There are two lists of parliamentary voters for the parish of W., viz. list No. 1, Division 1, being the list of persons entitled under the Reform Act, 1832, or by s. 3 of the Representation of the People Act, 1867, and list No. 3, being the list of lodgers under 41 & 42 Vict. c. 26, s. 22. There are also two lists of burgesses for the parish of W. The name of H. J. was on the parliamentary list, No. 1, Division 1.

The revising barrister held the notice to be invalid for omitting to state that the objector was on the "parliamentary" list, and also for omitting to define on which of the several lists his name appeared; and that he had no power to amend:—

Held, that the objector was not bound to state upon which of the several lists his name appeared; but that it was enough if he followed the words of the note appended to the form (I.), No. 2, in the schedule to 41 & 42 Vict. c. 26.

But, *semble*, that the omission to state that the objector was on one of the "parliamentary" lists was fatal, but was a mistake which the revising barrister had power to amend, and ought to have amended, under s. 28, subs. 2.

AT a Court held for the revision of the lists of voters for the city and borough of Bath, Henry James objected to the name of John England being retained on the list of voters for the parish of St. James, Bath.

The notice of objection was signed, "Henry James, of 36, New King Street, on the list of voters for the parish of Walcot."

There are two lists of parliamentary voters for the parish of Walcot, viz. List No. 1, Division 1, being the list of persons entitled under the Reform Act (2 Wm. 4, c. 45), or by s. 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), and List No. 3, being the list of lodgers published under 41 & 42 Vict. c. 26, s. 22. There are also two lists of burgesses for the parish of Walcot, viz. List No. 1, Division 1, and List No. 1, Division 3.

The name of Henry James was on the parliamentary list, No. 1, Division 1.

It was contended on behalf of England that the notice of objection was insufficient, inasmuch as Henry James stated

1879

JAMES v HOWARTH.

himself to be on the list of voters for the parish of Walcot, whereas he should have stated on which of the several lists for that parish his name appeared, and also should have defined the list to be a parliamentary list, as required by Form I. in the Schedule to 41 & 42 Vict. c. 26.

It was contended on the part of the appellant that the omission did not invalidate the notice of objection, and also that it was in the power of the revising barrister to supply the omission, under 41 & 42 Vict. c. 26, s. 28.

The revising barrister was of opinion that the notice was invalid for omitting to state in the description of the objector that he was on the parliamentary list, and also for omitting to define on which of the several lists his name appeared; and that he had no power to amend. He therefore retained the names of England and of fifty-nine other persons to whom the same objection was made, and whose cases were consolidated.

If the Court should be of opinion that the notices of objection were sufficient, the names of England and the others were to be expunged from the list of voters.

Ridley, for the appellant. The name of the objector was in fact upon the list of "parliamentary voters," No. 1, Division 1. The omission of the word "parliamentary" was at most a mistake which the revising-barrister might and ought to have amended under 41 & 42 Vict. c. 26, s. 28, but the omission could not mislead, seeing that he could have had no right to object unless he was on the parliamentary list. The objector has, it is true, failed to comply with the directions of the note to Form (I.) in the schedule. The error arose from his having followed the form of notice given in 6 & 7 Vict. c. 18, sched. No. 11, instead of that given in the schedule to the Act of 1878. The list upon which the objector's name appeared was both parliamentary and municipal; it was not necessary to distinguish between the general list and the lodger list.

[LORD COLERIDGE, C.J. If the revising barrister had power to amend the mistake, I think it is one which he ought to have amended.]

That he had power to amend is clear from subss. 1, 2, and 15 of s. 28 of 41 & 42 Vict. c. 26.

Odgers for the respondent. By the Act of 1878, each division is a separate list: see s. 15, subs. 7. And the note at the end of Form (I.),—which was not appended to Sched. No. 11 of 6 & 7 Vict. c. 18,—provides that, "if there is more than one list of parliamentary voters, the notice of objection should specify the list to which the objection refers; and, if the list referred to is made out in divisions, the notice of objection should specify the division to which the objection refers." This notice, therefore, is bad for not complying with that direction. The person objected to is not to be put to the inconvenience of searching more lists than one: *Eidsforth* v. *Farrer* (1); *Crowther* v. *Bradney* (2); *Tudball* v. *Town Clerk of Bristol.* (3) The notice is also bad for omitting the word "parliamentary," which is in Form (I.) The objector must shew that he is on the parliamentary list; otherwise he has no right to object. Then, had the revising barrister power to amend? or ought he to have amended? Subs. 1 of s. 28 of 41 & 42 Vict. c. 26, provides that "he *shall* correct any mistake which is proved to him to have been made in any list;" and subs. 2, that "he *may* correct any mistake which is proved to him to have been made in any claim or notice of objection." This is not a "mistake," it is a total omission of a word, the absence of which shews that he had no right to object: *Moss* v. *Lichfield.* (4) Having received a bad notice, the person objected to was not bound to attend to support his vote. The revising barrister therefore had no power to amend; and, if he had the power, this is not a case in which he ought to have exercised it.

[LORD COLERIDGE, C.J. We are all of opinion that the mistake in this notice ought to have been amended.

LINDLEY, J. The revising barrister evidently would have struck out these votes, if he had thought that he *could* amend.]

Ridley, in reply. The Act of 1878 intended to give the revising barrister a larger power of amendment than he had under 6 & 7 Vict. c. 18, s. 40. [*Samuel* v. *Hitchmough* (5) was referred to.]

LORD COLERIDGE, C.J. As far as the validity of the notice of

(1) 4 C. B. 9; 16 L. J. (C.P.) 132.
(2) 15 C. B. (N.S.) 536; 33 L. J. (C.P.) 70.
(3) 5 M. & G. 5.
(4) 7 M. & G. 72.
(5) 13 C. B. (N.S.) 3; 32 L. J. (C.P.) 55.

1879

JAMES v. HOWARTH.

objection depends upon the correct description of the objector, I am of opinion that there is no ground for Mr. Odger's contention except as to one point. He says that the objector must, if there be more than one list, specify the particular list (or division) upon which his name appears. That point rests upon the note appended to Form (I.) No. 2, in the schedule to the Act of 1878, which is very similar in its language to the note in schedule (B.) to 6 & 7 Vict. c. 18. It is enough, however, to say that there is no specific reference in that note to the particular list, if more than one (or division), on which the objector's name appears: it has reference only to the person objected to. As regards the objector, there is no reason for requiring the information which Mr. Odger contends for. It signifies nothing what may be the qualification of the person who attacks the voter, if he has a right to object. There is no foundation for the suggestion that the notice of objection should state any more than the words set down in the Act, or to the like effect. But it seems to me to be clear, that, if the words of the form are followed, sufficient information is given. Here, the objector's name in point of fact appears on the parliamentary list. If he had described himself as being "on the list of parliamentary voters," that would have been enough. No misleading could in that case have been seriously suggested: who he was and where he lived was there; and the nature of his qualification and his right to object would appear by a reference to the parliamentary list of voters. It has been contended for the respondent that the word "parliamentary" was essential, and that its omission was fatal; and upon this short ground, that the forms are by s. 8 to be considered as part of the Act. The word "parliamentary" was not inserted in the form given in 6 & 7 Vict. c. 18. But, inasmuch as the Act of 1878 deals with both parliamentary and municipal registration, and as s. 15 shews that there may be different lists in the same borough, some parliamentary and some municipal, it must, I think, be at least a matter of grave doubt whether or not the word "parliamentary" was essential to describe the list on which the objector's name appears. It is not necessary upon this occasion to determine that question; and I desire to be understood as expressing no positive opinion upon it, though the inclination of my opinion is strong that it

was necessary, and that the revising barrister was right in holding the omission of that word to be fatal. We must, however, take it that the revising barrister was of opinion that the mistake or omission was one which it was beyond his power to amend, but that he would have done so if he had thought he had the power. We are all of opinion that this is a case in which the revising barrister ought to have amended if he had power to do so. Some fifty or sixty persons who are not entitled to be on the register will, it seems, be retained if this defect in the notice of objection cannot be cured; and therefore it is most essential to ascertain whether or not the power to amend existed. Had the revising barrister, then, such power? The words of s. 28 of the Act of 1874 seem to me to be sufficiently clear,—"A revising barrister shall, with respect to the lists of voters for a parliamentary borough which he is appointed to revise, perform the duties and have the powers following: 1. He shall correct any mistake which is proved to him to have been made in any list; 2. He may correct any mistake which is proved to him to have been made in any claim or notice of objection." This is manifestly a mistake in a notice of objection; for, the objector, intending to describe himself properly, has followed the old form given in 6 & 7 Vict. c. 18, being ignorant and not having taken the trouble to inform himself of the altered form given by the Act of 1878. Of all cases, therefore, this seems to me to be clearly one in which it was within the power of the revising barrister to correct the mistake. I do not put it upon the powers of amendment contained in the 40th and 101st sections of the 6 & 7 Vict. c. 18. These rested upon totally different considerations, and nothing is to be gained by criticising their language. But, founding myself wholly upon the provisions contained in s. 28 of the Act of 1878, it appears to me that the amendment of the mistake here is well within the power of the revising barrister, and that he ought to have exercised it. On that ground and upon that ground alone, I am of opinion that the decision of the revising barrister was wrong and must be reversed.

DENMAN, J. The revising barrister states that he was of opinion that the notice was invalid "for omitting to state in the descrip-

1879

JAMES v. HOWARTH.

tion of the objector that he was on the parliamentary list, and also for omitting to define on which of the several lists his name appeared;" and he retained the names of the several persons objected to, because he thought he had no power to amend. And he goes on to say that, if the Court should be of opinion that the notices of objection were sufficient,—or, it must be assumed, capable of being made so by amendment,—the names of the several persons objected to were to be expunged from the list of voters. Looking at the circumstances of the case and the way in which the revising barrister has stated it, we were very properly not asked to send back the case for amendment. I express no opinion as to whether or not the mere omission of the word "parliamentary" would have been fatal. I do not dissent from what my Lord has said upon that subject: but I am not prepared to say that that difficulty might not have been got over. I am, however, clearly of opinion that the revising barrister had power to amend. I think it would be frittering away and making nugatory subs. 2 of s. 28 of 41 & 42 Vict. c. 26, to hold that he had not power to amend such a mistake as this. The objector signs his name; and adds "on the list of voters for the parish of Walcot." He only omits the word "parliamentary." His being upon any other list than the parliamentary list would not have entitled him to object. We must, therefore, assume that he was on the parliamentary list of voters for the parish of Walcot. It is a somewhat refined objection to take: but I cannot say it was not a valid one. The revising barrister would have amended if he had thought he had power to do so. I think he had power to amend, and that he ought to have amended. I therefore agree with my Lord that the decision must be reversed.

LINDLEY, J. I am of the same opinion. If there had been no power to amend, I must confess I should have thought the notice of objection bad for want of the important word "parliamentary" in the description of the list on which the name of the objector appeared. But, there being this power to amend, it appears to me that the mistake is one which the revising barrister might and ought to have amended. An omission is as much a mistake as the putting in something which ought not to be

inserted. The Act does not require the objector to state on which of the parliamentary lists of voters his name appears: and it is not for us to require more than the Act of Parliament does. The decision must be reversed.

LORD COLERIDGE, C.J. The successful party is successful only by reason of the Court thinking the revising barrister had power to amend. We therefore think each party should bear his own costs.

Decision reversed.

Solicitors for appellant: *Ellis, Munday, & Co.*

Solicitors for respondent: *Rogerson & Ford, for J. Ricketts, Bath.*

HAYWARD, APPELLANT; SCOTT, RESPONDENT.

Nov. 25.

Parliament—Borough Vote—Incapacited Persons—Receipt of Parochial Relief—Notice of Objection—Duty of Revising Barrister under 41 & 42 *Vict. c.* 26, *s.* 28, *subs.* 7.

The revising barrister is required by subs. 7 of 41 & 42 Vict. c. 26, s. 28, to expunge the name of every person, whether objected to or not, where it is proved before him that such person was on the last day of July then next preceding. incapacitated by any law or statute from voting at an election for the parliamentary borough, or an election for the municipal borough, as the case may be, to which the list relates:—

Held, that the "incapacity" here referred to means such incapacities as those mentioned in *Stowe* v. *Jolliffe* (Law Rep. 9 C. P. 734), not a mere temporary disqualification by reason of the receipt of parochial relief during the qualifying period: consequently, that, in absence of a notice of objection, the revising barrister was not bound to expunge the name of a person who had been in the receipt of such relief.

AT a court held for the revision of the lists of voters for the city and borough of Bath, Samuel Hayward sought to expunge from the list of voters for the parish of Lyncombe and Widcome, List 1, Division 1, under 41 & 42 Vict. c. 26, s. 28, subss. 7 and 8, the names of George Baker and eight other persons, on the ground that they had received parochial relief during the qualifying period.

In neither of these cases had notice of objection been given, as

1879

HAYWARD v. SCOTT.

required by 6 Vict. c. 18, s. 17, as amended by 41 & 42 Vict. c. 26. The fact of receipt of parochial relief by the persons named was admitted.

The revising barrister was of opinion that the words of s. 28, subss. 7 and 8, of 41 & 42 Vict. c. 26, did not apply to these cases; and he retained the names of Baker and the eight other persons on the list. If the Court should be of opinion that his decision was wrong, their names were to be expunged.

Ridley, for the appellant. The question is whether the receipt of parochial relief within the qualifying period is an incapacity within 41 & 42 Vict. c. 26, s. 28, subs. 7, which provides that the revising barrister "shall expunge the name of every person, whether objected to or not, where it is proved to him that such person was on the last day of July then next preceding, incapacitated by any law or statute from voting at an election for the parliamentary borough, or an election for the municipal borough, as the case may be, to which the list relates." It is not by statute only that a person receiving parochial relief was incapacitated from voting: he was disqualified at common law. The only authority which is adverse to this contention is the case of *Stowe Jolliffe*. (1) The question there was what votes were to be struck off upon a scrutiny: and Lord Coleridge, C.J., at the end of a written judgment, discusses whether the receipt of parochial relief is within the prohibition. He says: "The receipt of alms,—supposing the alms in this case to be such as to disqualify,—the receipt of parochial relief; non-residence within the proper distance of the borough; non-occupation; insufficient qualification: none of these things appear to satisfy the words of this proviso. (2) It does not mean persons who from failure in the incidents or elements of the franchise could be successfully objected to on the revision of the register: it means persons who from some inherent or for the time irremovable quality in themselves, have not, either by prohibition of statutes or at common law, the status of parliamentary electors. Such, for example, are peers, whether of the United Kingdom or of Scotland or of

(1) Law Rep. 9 C. P. 734, at p. 750. (2) 35 & 36 Vict. c. 33, s. 7.

Ireland, women, persons holding certain offices or employments the subjects of statutory provisions, and persons convicted of crimes which disqualify them from voting. I do not say this list is exhaustive. It is enough to give examples of the cases in which I think the register would be still open."

Without at all questioning the principle of that decision, it is submitted that the disqualification by reason of the receipt of parochial relief stands upon a totally different footing from the other instances put by the Lord Chief Justice. In the case of non-occupation, or of insufficient qualification, the party has failed to comply with the requirements of the statute. The 36th section of the Reform Act, 2 Wm. 4, c. 45, enacts that no person shall be entitled to be registered in any year as a voter, in the election of a member or members to serve in any future parliament for any city or borough, who shall within twelve calendar months next previous to the last day of July in such year have received parochial relief or other alms which by the law of parliament now disqualify from voting in the election of members to serve in parliament. By s. 40 of the Representation of the People Act, 1867, 30 & 31 Vict. c. 102, the overseers of every parish are directed to omit from the lists made out by them of persons entitled to vote for the borough and county in which such parish is situate, the names of all persons who have received parochial relief within twelve calendar months next previous to the last day of July in the year in which the list is made out. And by s. 12 of 41 & 42 Vict. c. 26, they are to ascertain from the relieving officer acting for that parish the names of all persons who are disqualified for being inserted in the list of parliamentary voters or burgess lists for that parish by reason of having received parochial relief. The names of these persons, therefore, ought never to have been put in the list at all.

[LOPES, J. They have always been placed on the list. I do not see how we can get over the decision of this Court in *Stowe* v. *Jolliffe*. (1) It would be a hardship on them if the overseers could omit their names without their having an opportunity to assert their rights.]

(1) Law Rep. 9 C. P. 734.

1879

HAYWARD v. SCOTT.

If improperly omitted, they may claim. The revising barrister has a right to expunge the names of persons who are disqualified, even when there is no objection made to them: *Wilson* v. *Town Clerk of Salford.* (1) The receipt of parochial relief is a statutory disqualification.

[LOPES, J. It is a personal incapacity. This section was introduced to meet the difficulty suggested in that case.

LINDLEY, J. You ask us to read "incapacitated" as "not entitled to vote."]

Incapacity means something different from a personal disqualification, which is a thing attaching to the person of the voter.

Dugdale, contrà, was not called upon.

LINDLEY, J. I am of opinion that the decision of the revising barrister was right, and must be affirmed. The question raised is, whether he was bound by subss. 7 and 8 of s. 28, to expunge the names of these persons. The case turns upon the construction of a few words of subs. 7, which runs thus,—"He shall expunge the name of every person, whether objected to or not, where it is proved to the revising barrister that such person was on the last day of July then next preceding incapacitated by any law or statute from voting at an election for the parliamentary borough, or an election for the municipal borough, as the case may be, to which the list relates." It has been argued that, inasmuch as by former statutes persons who are in receipt of parochial relief, or who have within the twelve months been in the receipt of parochial relief, ought not to be on the list at all, they are incapacitated under this subsection; and it is said that, unless it refers to such a case as this, there will be a difficulty in ascertaining to what incapacity it can refer. It refers, to my mind, to a general incapacity to vote at all, and not to a mere temporary disqualification. It points to incapacities of a different class altogether. Without, however, further considering the matter, I think the case is concluded by the decision of this Court in *Stowe* v. *Jolliffe.* (2) Although that case turned upon the language of a different statute, the ratio decidendi is exactly applicable to the

(1) Law Rep. 4 C. P. 398. (2) Law Rep 9 C. P. 734.

present case. I think therefore that the decision of the revising barrister must be affirmed.

1879

HAYWARD v. SCOTT.

LOPES, J. I also think we are bound by the decision of this Court in *Stowe* v. *Jolliffe*. (1) And, even if there had been no decision upon the point, I should have come to the conclusion that the revising barrister was right. I should have thought that "incapacitated" in this subsection referred to a general incapacity, such as that of a peer of the realm or a married woman, and not to a mere temporary incapacity which relates to the condition of the party with reference to the particular election only. I think the decision of the revising barrister was not only right, but also a very salutary one, and that it should be affirmed with costs.

Decision affirmed.

Solicitors for appellant: *Ellis, Munday, & Ellis.*
Solicitor for respondent: *Ricketts, Bath.*

PICKARD, APPELLANT; BAYLIS, RESPONDENT.

Nov. 29.

Parliament—Borough Vote—Lodger Franchise—30 & 31 *Vict. c.* 102, *s.* 4—*Amendment of Mistake in Claim under* 41 & 42 *Vict. c.* 26, *s.* 28, *sub-s.* 2—*Discretion of Revising Barrister.*

A claim by a lodger under 41 & 42 Vict. c. 26, s. 22, in the form in the schedule (H.) No. 2, for the first time to have his name inserted in the list of persons entitled to vote for a borough, omitted to state the amount of rent and the address of his landlord. These particulars were supplied at the revision: but the revising barrister declined to amend under s. 28, sub-s. 2:—

Held, that, this being the case of a mistake, not in a "list of voters," but in a list or catalogue of claims, it was not obligatory on the revising barrister to correct or amend it, but discretionary only; and, he having exercised his discretion for reasons which the Court thought satisfactory, his decision was affirmed.

AT a Court held for the revision of the lists of voters for the borough of Chelsea, Henry Picard claimed as a lodger, in respect of residence within the parish of St. Mary Abbotts, Kensington, to have his name inserted in the list of persons entitled to vote at the election of members to serve in parliament for the borough.

1. The claim was in the form H., No. 2, of the schedule to the

(1) Law Rep. 9 C. P. 734.

1879

PICKARD v. BAYLIS.

Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), and was as follows:—

Name of claimant in full, surname being first.	Description of rooms occupied, and whether furnished or not.	Street, lane, &c., and number (if any) of house in which lodgings situate.	Amount of rent paid.	Name and address of landlord or other person to whom rent is paid.
Pickard, Henry	2 rooms, first floor	46, Abingdon Road	Butler	Edmund Parker Carpenter.

and such claim was duly signed by the claimant, and was duly witnessed, and was regular in all respects, except as hereinafter mentioned.

2. In the second column of his claim, the claimant had omitted to state whether his lodgings were furnished or unfurnished: but the revising barrister held that this was a defect which he could amend upon proper evidence; and proper evidence was given to him that his lodgings were in fact unfurnished.

3. The claimant had further omitted to state in the fourth column of his claim whether he paid any rent; nor could that information be gathered from any other part of his claim.

4. Evidence satisfactory to the revising barrister was given in court as to what was the amount of rent which he actually paid, viz. 6*s.* 6*d.* per week; but the revising barrister held that, in cases in which lodger claimants had wholly omitted to give the information which parliament required them to give upon the face of their claims, he ought not to supply the defect upon evidence given for the first time in court; and that this applied with especial force to the fourth or rent column, because the form in which such claims were originally required to be made by the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), sched. G., form No. 1, had been expressly superseded by sched. H., form No. 2, to the Parliamentary and Municipal Registration Act, 1878, and by such new form the lodger was for the first time expressly required to state the amount of rent paid; so that it would, in the opinion of the revising barrister, be contrary to the policy of the later Act to allow such information to be given for the first time before the barrister in court: and he accordingly held that this objection was fatal, and declined to amend.

5. The claimant had further omitted to state the address of his landlord in the fifth column of his claim; nor could that information be gathered from any other part of his claim.

6. Evidence satisfactory to the revising barrister was given in court as to what was the address of his landlord, viz. the same address as that of the claimant: but the revising barrister held that he could not supply the landlord's address in the fifth column upon such evidence,—first, because it was admitted before him that his predecessors had always held this to be a fatal objection to a lodger claim, and there was for this purpose no substantial difference between form No. 1 of sched. G. to the Act of 1867 and form No. 2 of sched. H. to the Act of 1878, and that he ought therefore to follow the established practice,—and, secondly, because such practice was in his judgment correct; for, that the object of parliament in requiring lodger claimants to give that information was that any person interested might, from the information given by the claim, have the opportunity of making inquiries of the landlord or other person to whom the rent was thereby stated to be paid, for the purpose of testing the validity of the claim before the holding of the revising barrister's court; and that that object would be frustrated if the defect were allowed to be supplied upon evidence given for the first time before the barrister in court: and he accordingly held that this objection was also fatal to the claim; and upon both the above grounds he disallowed the claim.

7. Eight other persons,—all of whose claims it was admitted were lodger claims now for the first time made,—also claimed to have their names inserted in the list. Their respective claims were all subject to certain amendments which the revising barrister held himself entitled to make and did make upon evidence given to him in court regular in all respects, except that each of those eight claimants had omitted to state in the fifth column of their respective claims the address of the landlord or other person to whom their rents were respectively paid, nor could that information be gathered from any other part of their claims.

8. Evidence satisfactory to the revising barrister was given in court as to what were the addresses of such last-mentioned landlords or other persons respectively, viz. the addresses respectively stated in the fifth column of the eight claims as set forth in the

1879

PICKARD v. BAYLIS.

second schedule to the case: but he disallowed those claims upon the same ground as is stated in the sixth paragraph of this case.

9. Due notice of appeal was given, and the appeals in all the before-mentioned cases were ordered to be consolidated.

If the Court should be opinion that the decision was wrong, the register was to be amended,—as to Pickard, by inserting his name as a lodger, and adding the word "unfurnished" in the second column of the claim, expunging the word "Butler," and inserting in lieu of it "6*s.* 6*d.* a week" in the fourth column, and adding "same address" in the fifth column,—and, as to the other eight claimants, by inserting their names as lodgers in the form stated in the schedule to the case.

Nov. 20, 1879. *Crompton*, for the appellants. The defects in these claims having been supplied at the revision, the revising barrister was bound to amend under 41 & 42 Vict. c. 26, s. 28, subss. 1, 2, and 6.

[LORD COLERIDGE, C.J. Is that so where the mistake is not in a list, but in a claim?]

The case does not fall within the exception in subs. 13,—"Except as herein provided, and whether any person is objected to or not, no evidence shall be given of any other qualification than that which is described in the list or claim, as the case may be, nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same,"—and therefore it is submitted that the revising barrister was bound to amend.

No one appearing for the respondent, Lord Coleridge, C.J., observed that, on a question of so much importance, it would not be desirable to decide without hearing counsel on both sides: and he intimated that he would communicate with the Attorney General, and request him to cause some one to be instructed to argue the case on the respondent's behalf.

Nov. 29. *Crompton*, for the appellant, submitted that, under s. 28, subss. 1, 2, and 6, of 41 & 42 Vict. c. 26, the matters omitted or insufficiently described having been supplied at the

revision, the revising barrister had no discretion, but was bound to amend; and that, if he had a discretion, it was plain upon the face of the case that he had not exercised it.

E. Clarke, contrà. The mistakes which the revising barrister is bound to correct under the sub-sections of s. 28 of 41 & 42 Vict. c. 26, referred to are mistakes in "lists of *voters*," not in lists or (more properly speaking catalogues) of *claims*. These are dealt with by sub-s. 2, which clearly gives the revising barrister a discretion to amend or not as he may think the justice of the case requires. Lodger claimants are of two kinds,—those who have already in a former year claimed and had their claims allowed by the revising barrister, and who are then upon a list of voters (but who are nevertheless bound to claim in each succeeding year),—and those who (like the present claimants) claim for the first time, and consequently have not yet got upon any "list of voters." Having a discretion, therefore, if it appears (which it undoubtedly does here) that the revising barrister has exercised his discretion, the Court will not interfere.

Crompton was heard in reply.

LORD COLERIDGE, C.J. I am of opinion that the decision of the revising barrister in this case was correct and must be affirmed. Two questions only arise,—first, whether the revising barrister was bound to amend the defects in the claim, under sub-s. 1 of s. 28 of the Parliamentary and Municipal Registration Act, 1878, 41 & 42 Vict. c. 26,—secondly, whether, if not so bound, but having a discretionary power of amendment under sub-s. 2, he has in fact exercised his discretion. I think this was a case purely for the exercise of the discretion of the revising barrister, and that the words of the Act are not imperative on him to make the amendment which he was asked to make. The words under which the revising barrister was required to make the amendment are, "He shall correct any mistake which is proved to him to have been made in any list." If this was the case of a mistake in a list, he was bound by the express words of the sub-section to correct it. It is necessary, therefore, in order to sustain his

1879

PICKARD v. BAYLIS.

decision, to hold that these were not "mistakes in a list" within the meaning of the sub-section in question; and I am of that opinion.

It is not in my judgment necessary in deciding this question to go through at length the observations which have been made in the course of the argument; but it is necessary to consider what were the duties of the revising barrister under the earlier Acts as well as what they are under the more recent legislation,—to see what were his duties under 6 & 7 Vict. c. 18, and what are the new duties imposed upon him by the Representation of the People Act, 1867, 30 & 31 Vict. c. 102, and this Act of 41 & 42 Vict. c. 26.

I pass at once from the whole subject of county revision; for, I observe that in counties as well as in boroughs the revising barrister is to perform the duty which indeed is expressed in his very name; he is to *revise*, not to *correct* the existing lists, whether in the one or the other. As to boroughs, before the introduction of the lodger franchise his duty was to take the parish lists as presented to him by the overseers, and to retain on them the names of all persons not objected to, to insert therein the names of the different persons who have claimed to have their names inserted, and whose claims he has allowed, and to expunge from them those of all persons who were properly objected to by the overseers or by others having a right to object; and the catalogue of voters (as Mr. Clarke has phrased it) so made up of the old voters whose names were so retained, and of the new ones so inserted, became the parliamentary list of voters for the ensuing year; and so from year to year. That is, I think, an accurate description of the state of things which the revising barrister had to deal with in respect of boroughs prior to the Act of 1867. By that Act, persons occupying lodgings in a certain manner for the first time had the franchise conferred upon them; and, as it was part of the essence of the franchise that the lodging shall be the same,—for, even under 41 & 42 Vict. c. 26, s. 6, sub-s. 2, it must be in the same house,—the legislature thought it right that a lodger who was to have a vote in respect of his lodgings, should be obliged year by year to make a claim. That was the state of things from

1867 to 1878; and, applying the old law and practice as to claims, it placed lodger voters in this condition,—possibly one of some hardship,—that, whereas other voters having once claimed and got their names placed upon the list, were not put to the trouble of claiming again, and, unless objected to, were not obliged to appear to support their rights, the lodger voter was compelled to stand every year in the technical position of a fresh claimant. It was probably thought unfair that he should thus be placed in a less favourable position than other voters, and therefore the Act of 41 & 42 Vict. c. 26, was passed. By s. 22 of that Act it is substantially enacted that lodger voters are to be placed in the list under a separate heading, but, when once they have established their claim and satisfied the revising barrister that they are entitled to vote, they are substantially placed in the same situation as any other voters. I am of opinion that s. 23 is amply satisfied by holding that it points only to the case of such persons, and that a lodger once on the register of voters, although still put to his formal claim in each succeeding year, shall not be brought before the revising barrister time after time to sustain his vote, but may rely upon the declaration annexed to the claim as primâ facie evidence of his qualification; and he must, if his right to be on the list is impeached, be objected to like any other voter. That is the only disadvantage under which he now labours. The combined effect of ss. 22 and 23 is as I have described. What we have here to deal with are new lodger claims,—the claims of persons who do not at present form part of any list. They are not upon the old list of voters; and they are not upon the list of lodger voters who have claimed before and whose claims have been allowed. What other list, then, has the revising barrister to deal with? None. The claim is not a list. The catalogue of new claims is not a list upon which any one can be retained or from which any one can be expunged. It is a list of persons qualified to be inserted as voters by the revising barrister. That seems to me to shew clearly that the mistake proved to have been made here is not a mistake in any list which the barrister has to deal with, and therefore is not a mistake which he *shall* deal with. It follows that, if this is not a list, it must be a claim: and, with regard to these, sub-s. 2 of s. 28 of the Act of 1878 provides that

1879

PICKARD v. BAYLIS.

the revising barrister "may correct any mistake which is proved to him to have been made in any claim." The word "may" in a sub-section following one which provides that he "shall" correct any mistake which is proved to him to have been made in any *list*, evidently means what it says: in the one case he is bound to correct the mistake; in the other he may if he thinks fit.

That brings me to the second question in this case,—Has the revising barrister here exercised his discretion? I think he has. No human composition is free from possible objection or criticism. But, looking fairly at the language of par. 6 of the case, the conclusion I come to is that the revising barrister did exercise his discretion in the matter. There were two objections,—first, that the claimant had omitted to state in the fourth column of the claim the amount of rent paid; secondly, that he had omitted to give the address of his landlord in the fifth column. As to the first, the revising barrister held the objection fatal, and thought he ought not to amend; and he gives his reasons, viz. that it was contrary to the policy of the Act to allow the information to be given to him for the first time in court. As to the second objection, he held that "he could not supply the landlord's address in the fifth column" upon the evidence offered. But he gives his reasons, as follows:—"First, because it was admitted before him that his predecessors had always held this to be a fatal objection to a lodger claim, and there was for this purpose no substantial difference between form No. 1 of Sched. G. to the Act of 1867 and form No. 2 of Sched. H. of the Act of 1878, and that he ought therefore to follow the established practice." That might have been a good reason for his conclusion if he was exercising a discretion, but no reason at all if he was bound to make the required correction. But he goes on to say,—"Secondly, because such practice was in his judgment correct; for that the object of parliament in requiring lodger claimants to give that information was that any person interested might, from the information given by the claim, have the opportunity of making inquiries of the landlord or other person to whom the rent was thereby stated to be paid, for the purpose of testing the validity of the claim before the holding of the revising barrister's court; and that that object would be frustrated if the defect were allowed to be supplied

upon evidence given for the first time before the barrister in court." And he goes on to say, "And I accordingly held,"—that is, for the reasons above given,—"that this objection was also fatal to the claim; and upon both the above grounds I disallowed the claim." For the reasons given, he thought he could not correct the mistake,—not necessarily meaning that he had not the power to do so. I am, therefore, of opinion that the revising barrister did exercise his discretion; and I may add in my judgment upon very good and reasonable grounds. I think his decision ought to be affirmed.

DENMAN, J. I am of the same opinion, though I have entertained grave doubts in the course of the argument, some of which are not absolutely removed. I am extremely glad that we required the case to be re-argued; and we are much indebted to Mr. Clarke for the able assistance he has afforded us. Three questions of law have been discussed,—first, whether, assuming that an amendment was in fact necessary in order to place the claimant on the list of voters, the revising barrister was bound to amend; secondly, whether any amendment at all was necessary, or whether subs. 2 of s. 23 of the Registration Act of 1878 does not make the declaration accompanying the claim primâ facie proof of the claimant's right to be put in the list; thirdly, whether, assuming that the revising barrister was not bound to amend, but had a discretion to amend or not, the revising barrister has in this case exercised that discretion. Upon all these points I am of opinion that the respondent is entitled to our judgment. The first point lies in a very small compass; for, though former statutes had some application to the question, it really turns upon the true construction of a few sections of the Act of 1878. By s. 22 of that Act it is enacted that, "where a person is entered in respect of lodgings on the register of voters for the time being in force, and desires to be entered on the next register in respect of the same lodgings, he may claim to be so entered by sending notice of his claim to the overseers of the parish in which his lodgings are situate on or before the 25th day of July." Then follow other provisions relating to that sort of claimant. It appears to me that that section can only be read as relating to a

1879

PICKARD v. BAYLIS.

person who was on the register of voters as a lodger for the preceding year. He is on the register of voters for the preceding year, and desires to be entered on the list of voters for the ensuing year. Then comes s. 23 which provides that, "in the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall, for the purposes of revision, be primâ facie evidence of his qualification." That, as it seems to me, can only be read as referring to claims made by persons who were before entitled to vote. Sect. 28 raises the question whether the revising barrister was *bound* to amend or not. It enacts that "a revising barrister shall, with respect to the list of voters for a parliamentary borough which he is appointed to revise, perform the duties and have the powers following,—1. He shall correct any mistake which is proved to him to have been made in any list. 2. He may correct any mistake which is proved to him to have been made in any claim or notice of objection." If the claimants in this case had been old lodger voters, subs. 1 would apply. But it is admitted that they are new claimants; and, that being so, according to the plain meaning of the words, and looking at the difference between claimants and persons on the list, I am of opinion that they are within the second subsection, and not within the first. My Lord has given some additional and, as it seems to me, sufficient reasons for so deciding; and therefore I agree with him in holding that the revising barrister was not *bound* to amend, but had a discretion to amend or not as he thought fit. But it was argued that the words of s. 23 are large enough to embrace this case. It appears to me, however, to be clear, after the discussion we have heard, that that section only applies to the case previously dealt with by s. 22, and must be read "a person claiming to vote as a lodger," not for the first time, but having been previously on a list. I think that interpretation is a just and reasonable one, coupled with the fact that, if not so limited, s. 23 would be giving to lodgers claiming for the first time the privilege of obtaining by mere declaration that which all other voters can only obtain by a more difficult process. It appears to me to be clear that s. 23 does not apply to one claiming for the first time to vote. That being so, I now come to the third point. Assuming that the revising barrister was not bound to amend, has

he exercised a discretion? The language he has used might possibly have been more clear; but, upon the whole, putting a fair and reasonable construction upon his words, I think it is tolerably clear that the revising barrister did intend to give discretionary reasons for what he has done. The mere use of the words "could not" does not override the general scope of his reasoning to shew that he did not consider the amendment asked for a fair one. He declined to amend, not because he conceived that he had no power to do so, but because he could not do it without working injustice. For these reasons, I concur in thinking that the respondent is entitled to judgment.

LINDLEY, J. I am of the same opinion. It is conceded that the class of persons we are dealing with are persons claiming for the first time to vote as lodgers, and not persons whose names are standing in any list. In the next place, for the reasons given by my Lord and my Brother Denman, I think the statement of the revising barrister fairly construed clearly shews that he intended to exercise and did exercise his discretion in declining to amend. The question therefore comes to this whether he had a discretion in the matter, or was *bound* to make the amendments he was asked to make. To answer that question, we must see what he was dealing with. The power to amend is conferred upon him by the first two subsections of s. 28 of 41 & 42 Vict. c. 26,—1. "He shall correct any mistake which is proved to him to have been made in any list,"—2. "He may correct any mistake which is proved to him to have been made in any claim or notice of objection." The first thing to ascertain is what is the meaning of "list" as there used. I think it is plain that it means "list of voters," not "list or catalogue of claimants." If we look back, we find that these last-mentioned persons are not on any list of voters. The lodger franchise was first created by the Representation of the People Act, 1867, 30 & 31 Vict. c. 102, s. 4. The party must send in a claim to the overseers; and what is to be done is defined by s. 30, subss. 2 and 3. Subs. 2 provides that "the claim of every person desirous of being registered as a voter for a member or members to serve for any borough, in respect of the occupation of lodgings, shall be in the form numbered 1 in Schedule (G.), or

1879

PICKARD v. BAYLIS.

to the like effect, and shall have annexed thereto a declaration" that he has occupied during the required period, and that the lodgings are of the required value; "and every such claim shall after the last day of July and on or before the 25th day of August in any year be delivered to the overseers of the parish in which such lodgings shall be situate, and the particulars of such claim shall be duly published by such overseers on or before the first day of September next ensuing, in a separate list, according to the form numbered 2 in the said Schedule (G.)." It then goes on to provide that "so much of s. 18 of 6 Vict. c. 18, as relates to the manner of publishing lists of claimants, and to the delivery of copies thereof to persons requiring the same, shall apply to every such claim and list; and all the provisions of the 38th and 39th sections of the same Act with respect to the proof of the claims of persons omitted from the lists of voters and to objections thereto, and to the hearing thereof, shall, so far as the same are applicable, apply to claims and objections and to the hearing thereof under this section." These lists were not lists of voters at all, but lists of persons seeking to get on the lists of voters. This is how the matter stood until the year 1878, when for the first time a distinction was made between the two classes of lodger voters, viz. those who had been upon the list for the preceding year, and those who for the first time claimed the new franchise. The former claim every year in the form (D.) No. 3, under s. 22 of 41 & 42 Vict. c. 26; and these form the list of lodger *voters*. These persons are not upon that list, but upon a separate list the form of which is given in (H.) No. 2, which is a list or catalogue of *claimants*, not of *voters*. They are persons who are desirous of getting on the list of voters, and who may get there at the revision. Then we come to s. 28, which deals both with lists and claims. It begins, "The revising barrister shall, with respect to the lists of voters for a parliamentary borough which he is appointed to revise, perform the duties and have the powers following: (1.) "He shall correct any mistake which is proved to him to have been made in any list," that is, in any list of voters; and so in sub-s. 3 and the other sub-sections. No part of the clause renders it *incumbent* on the revising barrister to correct any mistake in a *claim*. Sub-s. (2.) says, "He *may* correct any mistake which is

proved to him to have been made in any claim or notice of objection." He has a discretion: and in this case I think he has exercised it, and, so far as I can see, properly exercised it. In small boroughs, where everybody knows everybody else, mistakes such as these might properly be corrected; but, in a large borough like that in question, where the claims are so numerous, it is not unreasonable to require more strictness and accuracy. As to s. 23, there may be some doubt as to its meaning; but I think it clear that it has no application to this case. It deals with qualifications only, not with votes, or the form of the claim. Sect. 8 makes the forms important. The amount of the rent is no part of the qualification. It is required by the form to be inserted, it is true; but the qualification depends upon the value of the lodgings, not upon the amount of rent paid for them: and it is quite possible that a lodger may have a qualification, though he pays no rent at all. But in that case he should say so. For these reasons, I am of opinion that the revising barrister had power to amend the mistakes in question, but that he had a discretion to amend or not; that he has in fact exercised that discretion; and that the reasons he has given satisfy my mind that he has exercised it properly. His decision will be affirmed.

Clarke asked for costs.

LORD COLERIDGE, C.J. As this argument was invited by the Court, we think it hardly a case for costs.

Decision affirmed.

Solicitors for appellant: *Hulse, Trustram, & Co.*
Solicitor for respondent: *Baylis.*

1880
March 12.

THE WAKEFIELD URBAN SANITARY AUTHORITY, APPELLANTS: MANDER, RESPONDENT.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150—*Footway, Apportionment of Expenses—Premises "fronting, adjoining, or abutting."*

An urban authority, acting under 38 & 39 Vict. c. 55 (The Public Health Act, 1875), s. 150, repaired the footway on the south side of a street, and apportioned the whole cost among the owners and occupiers of premises on the south side only :—

Held, that the apportionment was right.

CASE stated by justices for the borough of Wakefield under 20 & 21 Vict. c. 43.

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, "Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway, footway, or any other part of such street, is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting the same within a time to be specified in such notice . . . If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act."

By s. 151 it is provided that "the incumbent or minister of any church, chapel, or place appropriated to public religious worship, which is now by law exempt from rates for the relief of the poor, shall not be liable to any expenses under the last preceding section, as the owner or occupier of such church, chapel, or place,

or of any churchyard or burial ground attached thereto, nor shall any such expenses be deemed to be a charge on such church, chapel, or other place, or on such churchyard or burial ground, or to subject the same to distress, execution, or other legal process; and the urban authority may, if they think fit, undertake any works from the expenses of which any such incumbent or minister is hereby exempted.

By s. 257, "where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same."

The respondent's premises were situated on the south side of St. John's Place, Wakefield, a street within the district of the appellants. St. John's churchyard fronts, adjoins, or abuts on the whole of the north side of St. John's Place. The appellants gave notice to the owners of property in the street to do certain repairs to the footway and channel on the south side of the street, and, the notice not being complied with, the appellants themselves executed the works, which were confined to the south side of the street only. The apportionment of the expenses incurred by the appellants in carrying out the works was made upon the owners of property on the south side of the street only. The appellants did not call upon the trustees of the churchyard on the north side of the street to contribute to the expense, they being exempt under s. 151, nor did the appellants themselves in any way contribute to the apportionment of the said expenses. Within three months of the service upon him of a notice of the amount settled by the surveyor to be due from the respondent, the latter gave due notice to the appellants disputing the apportionment. The respondent contended before the justices that appellants were under ss. 150 and 151, bound to apportion the costs of the repairs equally between themselves and the owners of property on the south side of the street. The appellants contended that the property on the north side did not front, abut, or adjoin the footway on the south side to which the repairs were done, and the south side was liable

1880

WAKEFIELD SANITARY AUTHORITY. v. MANDER.

to pay the whole of the expenses. The justices decided in favour of the respondent, and refused to make an order for payment of the assessment, but on the application of the appellants stated a case for the opinion of the Court.

Cave, Q.C., and *Forbes*, for the appellants. To satisfy the words "abut" and "adjoin" the premises in respect of which the expenses for repairing the footway are charged must be immediately approximate to it. The use of the word "fronting" cannot enlarge the obvious ordinary meaning of those words. If houses were at first built only on one side of a road, and a footway were made on that side, and afterwards houses were built on the other side and a footway made there also, then, if the respondent is right in his contention, the old houses would contribute to the cost of the footway on both sides, but the new houses to that on one side only.

[GROVE, J. May not a house be said to "front," though it does not "adjoin" or "abut" on a footway, the one word being used in a different sense to the other two?]

Such an interpretation would strain the plain meaning of the words. In the *Vestry of Mile End* v. *Whitechapel Union* (1), the defendant's buildings abutted on one side of a new street which the vestry directed to be paved over half its breadth only, the part paved being that nearest to the defendant's premises. The whole cost was apportioned by the vestry upon the owners of the houses forming the defendant's side of the street, but it was held that the owners of houses on both sides ought to have been charged. This case is, however, really in the appellants' favour; the proceedings were taken under s. 77 of the Metropolis Local Management Act (25 & 26 Vict. c. 102) which imposes a liability to contribute to the expenses on the owners of land bounding or abutting "on such street," whereas the Public Health Act, 1875, imposes the liability on the owners or occupiers of the premises fronting, adjoining, or abutting "on the parts which require to be paved." Here, the houses on one side front and abut on one footway only, and those on the other side the other. [They also cited *Whitchurch* v. *Fulham*. (2)]

(1) 1 Q. B. D. 680.

(2) Law Rep. 1 Q. B. 233.

Wills, Q.C., and *Graham*, for the respondent. The expression "fronting, abutting, or adjoining on such parts thereof," means parts of the street, not of the footway. If the carriageway had been repaired instead of the footway, there would have been nothing adjoining or abutting on it; and if the appellants are right, the roadway would have to be divided longitudinally down the medium filum, a proposition which has never been contended for.

[GROVE, J. Do you contend that all the three words must be applicable in order to fix liability?]

No; it is sufficient if any one of them is applicable. It is not contended that the respondent is not liable to contribute to the expenses, but that the owners of premises on the other side are liable also. In every case the houses on both sides "front" the street.

[DENMAN, J. If that is so the word "abutting" is unnecessary.]

No; a yard not fronting a street, but running behind the houses and connected with the street by a gateway only, has been held to "abut," though it clearly did not "front" the street. A footway is not for the exclusive use of one side; sometimes there is a footway on one side only. Lamps are frequently on one side only of a road, and if the appellants are correct, only that side can be charged. Suppose the whole street paved at one time, but much more work done on one side than on the other; it is nevertheless one operation, and each side is equally liable. The same reasoning applies where one side is done first, and the other a year afterwards; each side should pay for half of each work. Some meaning must be given to the word "front;" premises front that which lies in front of them, and not merely that which touches them. The words "adjoin" and "abut" were inserted ex abundanti cautelâ. The cases cited on the other side are not in point; they were decided under different Acts, using different language.

Cave, Q.C., in reply. The legislature does not say that the premises are to front, abut on, or adjoin the street, but the part which has to be levelled or flagged; viz., in this case the footway on the south side.

1880

WAKEFIELD SANITARY AUTHORITY v. MANDER.

GROVE, J. I am of opinion that the appellants are entitled to succeed. The language of the statute is not very clear, but its general meaning appears to be that expressed in the maxim, Qui sentit commodum debet sentire et onus; the person who immediately gets the advantage is to pay for it. If the contention of the respondent is correct there is no usefulness in the words "adjoin" or "abut." I do not think the word "parts" can be taken to mean transverse sections of a street, but rather the local parts to which the repairs are done. Besides, the 150th section of the Public Health Act, 1875, does not impose the liability on the owners of premises fronting, adjoining, or abutting on "such street," but on "such parts thereof as require" repair. The meaning of this expression is to make the premises adjoining the part repaired liable. It cannot be said that the footway in question either "adjoins" or "abuts" on the north side of the street, whereas it does so on the south; and it would be straining the language of the Act to say that it "fronts" the north side. Our judgment is for the appellants with costs.

DENMAN, J. I am of the same opinion, but I have felt considerable hesitation in arriving at this conclusion. The difficulty arises from the use of three different words which apply to very different things, such as paving, sewering, and lighting. The subject-matter of the present case is a definite part of the street, viz., one of the footways; it can be cut off from the rest of the street, and the owners of houses abutting on the footway may be called on to do the whole of the work required, the word "footway" being specially mentioned in the 150th section of the Act, as one of the definite parts of a street which may require repair. I think, that under this Act, one side of a street is to be responsible solely for the pavement on that side.

Graham asked for leave to appeal, which was granted.

Judgment for the appellants.

Solicitors for appellants: *Pitman & Lane.*
Solicitors for respondent: *Harrison & Beaumont.*

GOTHARD AND OTHERS, PETITIONERS; *v.* CLARKE AND OTHERS, RESPONDENTS. 1880 *April* 26.

Municipal Election—Candidate for Office of Town Councillor—Nomination Paper—Statement of Number on Burgess Roll of Nominator—38 & 39 *Vict. c.* 40, *s.* 1, *sub-s.* 2, *Sched.* 1, *Form* 2; 41 & 42 *Vict. c.* 26, *s.* 41; 35 & 36 *Vict. c.* 33, *s.* 13.

The number on the burgess roll of a burgess nominating a candidate at a municipal election for the office of town councillor, must, in order to satisfy the requirements of 38 & 39 Vict. c. 40 (The Municipal Elections Act, 1875), s. 1, sub-s. 2, Sched. 1, Form 2, and Note, be stated in the nomination paper. Therefore, where, instead of the right number 695, the number 704 appeared in such paper, and an objection taken thereto was allowed by the returning officer, although no one had been or could be misled by the mistake:—

Held, that the decision of the returning officer was correct, and that the effect of the mistake was not remedied by and could not be amended under the provisions of 41 & 42 Vict. c. 26, s. 41, and 35 & 36 Vict. c. 33, s. 13.

SPECIAL CASE stated pursuant to an order of Stephen, J.

The petitioners were respectively candidates at an election for the office of councillor for a ward of the borough of Stockport. Three of the respondents were also candidates. Those respondents had been declared by the respondent, the returning officer, to be duly elected.

The nomination papers of the petitioners were identical, except as to the surnames and other names, and places of abode and descriptions of the persons nominated, all which were as regards each of the petitioners correctly stated in their respective nomination papers. The proposer and seconder and eight assenting burgesses were the same in the case of each of the petitioners. The seconder was thus described in the nomination paper of the petitioners:

	Christian Names in full of Nominators.	Surname.	Description.	Abode.	No. on Burgess Roll.	Situation of Property as stated on Burgess Roll.
Seconder	George	Chapman	Draper	1, Heaton Place, Heaton Norris.	464 / 695	1, Heaton Place, Heaton Norris.

On the 24th of October, 1879, the respondent returning officer

1880

GOTHARD v. CLARKE.

who was the mayor, attended at the town hall for the purpose of deciding on the validity of objections to nomination papers.

Objections were in due form made to the nomination papers, on the ground that—

"The register number on the Heaton Norris ward list 695, does not represent George Chapman, of 1 Heaton Place, Heaton Norris, the nominator of John McClure, Adam Gothard, and Thomas Oldham, candidates for the said ward.

"Also that the said ward being divided into polling districts, and there being two numbers 695, neither represented the said George Chapman, the nominator of the said John McClure, Adam Gothard, and Thomas Oldham, but other persons, viz., Henry Vaudray and John Dawson Bower.

"Also, that as the burgess number of George Chapman is wrong the nomination is insufficient, and the description misleading."

On the 27th of October, 1879, the respondent mayor gave his decisions in writing allowing the objections, and thereupon declared the other respondents duly elected, as being, according to such decision, the only candidates duly nominated for the ward.

The number 695 inserted in the nomination papers of the petitioners respectively, as the number on the burgess roll of George Chapman, was the number of the said George Chapman as shewn in certain uncorrected proofs of the burgess roll, 1879–80, which had been supplied on or about the 17th of October, 1879, by a clerk in the town clerk's office, to the agents of the two political parties in the borough. In such proofs certain numbers 486 to 493 both inclusive, had, by a clerical error, been inserted twice over in the list in which the name of the said George Chapman appeared, and when this error was discovered, which was before the 22nd of October, 1879, the same was corrected by the town clerk in finally settling the burgess roll, by pasting new numbers opposite all names in the said list subsequent to the point at which the said error had occurred. The effect of such correction was, that in the burgess roll as completed on the said 22nd of October, the said George Chapman's number was 704

instead of 695, and the numbers of all the other burgesses in the same list were similarly advanced by nine. The respondents' agent obtained a copy of the published list upon the morning of the 23rd of October, the said copy having the correct numbers pasted on, and therefrom filled in the registration numbers in the nomination papers of the respondents. The petitioners' agent might also have obtained a correct copy of the burgess list, 1879–80, on the morning of the said 23rd of October, but he did not apply for the same. It was no part of the duty of the town clerk before publishing the burgess roll of 1879–80, to supply copies thereof or information contained therein to the respective candidates or their agents.

The number stated in the respective nomination papers of the petitioners as the number of the said George Chapman on the burgess list for the year 1878–79, and printed in italics, was correctly stated. The said George Chapman was a justice of the peace for the borough of Stockport, and for the Salford hundred of the county of Lancaster, a town councillor of the borough, chairman of the board of guardians for the Stockport Union, and during the years 1859 and 1860 acted as mayor of the borough of Stockport. He had resided at the address given in the said nomination papers for nearly thirty years, and was well known to all the burgesses of the borough, and especially to those of the Heaton Norris ward. No person was or could be misled in any way by the alleged inaccuracy in the said nomination papers, nor was there, nor could there be, any doubt as to the identity of the said George Chapman.

The question was whether the above decision was right. If the decision was right, the petition was to be dismissed with costs. If the decision was wrong, the respondents elected were to be declared not duly elected, and the costs were to be paid by the respondents, and the Court were to make such further order as to them should seem fit.

April 23. *Sir H. James, Q.C.* (*Hopwood, Q.C.*, and *Aspland*, with him), for the petitioners. First. A mere clerical slip has been made in the nomination paper. The error could not and did not mislead any one. It did not avoid the election. Many of the provisions

1880

GOTHARD v. CLARKE.

of 38 & 39 Vict. c. 40, The Municipal Elections Act, 1875, s. 1, must no doubt, be strictly complied with; subs. 2 enacts, that "the nomination paper shall state the surname and other names of the person nominated, with his place of abode and description," so far the requirements must be exactly satisfied, but the following words "and shall be in the form No. 2 set forth in the first schedule to this Act, or to the like effect," allow some latitude. The form in the Act is not itself quite correct. After the initials representing the signature of the subscriber is placed the word "of*" with an asterisk referring to the foot of the form, where there is the note on which the present case turns. "*The number on the burgess roll of the burgess subscribing, with the situation of the property in respect of which he is enrolled on the burgess roll." But it is evident that the number on the burgess roll cannot immediately follow the word "of," which is intended to precede the description of a locality.

Persons are not bound to literally adhere to the form. If they were, the words "to the like effect" would be useless. The distinction between the requirements of the sections and the directions of the form is shewn by the case of *Mather* v. *Brown* (1), where the name of a candidate "Robert Vicars Mather," being written "Robert V. Mather," the Court held that this was not such a statement of "the surname and other names of the persons nominated" as to satisfy s. 1 and the form, and the case of *Howes* v. *Turner* (2), where a nomination paper in which the Christian name of a proposer was abbreviated was held good, because there was no requirement in the body of the Act that the Christian name of a proposer should be set out at length. The form is directory, and non-compliance with a mere direction does not invalidate the nomination paper: *Soper* v. *Mayor of Basingstoke* (3); Rogers on Elections, 12th ed. p. 154; *Reg.* v. *Lofthouse.* (4) Secondly. A remedy for such an error has been provided by statute. Probably to meet cases like *Mather* v. *Brown* (1), 41 & 42 Vict. c. 26, the Parliamentary and Municipal Registration Act, 1878, s. 41, enacts that "Section thirteen of the Ballot Act, 1872, shall, with respect to any municipal election,

(1) 1 C. P. D. 596.
(2) 1 C. P. D. 670.
(3) 2 C. P. D. 440.
(4) Law Rep. 1 Q. B. 433.

apply to non-compliance with any of the provisions of or mistake or error in the use of any of the forms prescribed by the Municipal Elections Act, 1875." By the Ballot Act, 1872, 35 & 36 Vict. c. 33, s. 13, "No election shall be declared invalid by reason of a non-compliance with the rules contained in the First Schedule .... or any mistake in the use of the forms in the Second Schedule .... if it appears to the tribunal having cognisance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election." The word "election" is there used in different senses, viz., the process and the result of the election. By rule 13 "The returning officer shall decide on the validity of every objection made to a nomination paper, and the decision, if disallowing the objection, shall be final; but if allowing the same shall be subject to reversal on petition questioning the election or return." Section 1 of the Ballot Act, 1872, providing that a candidate may, "during the time appointed for the election," withdraw, and for the "adjournment of an election . . ." for the purpose of taking a poll, shews that "election" means there the nomination, and not the polling. "Nothing can be more distinctly divided in treatment or in words than that which is in the Ballot Act called 'the election' from that which is called 'taking the poll:'" per Brett, J., *Northcote* v. *Pulsford*. (1) In that case there was a mistake in the form of the ballot paper, the form of which was given in the schedule of the Ballot Act, the Court said that as it neither deceived nor misled any voter into voting for a wrong person, it did not affect the result of the election, and was cured by s. 13 of the Ballot Act. The mayor ought to have amended the number. It would be a narrow construction of the Act to hold that such a slip should vitiate the election, and that until the election is over the powers of amendment cannot be exercised, and that s. 13 only operates when the case reaches this Court. The returning officer may sometimes have political bias, and therefore it is undesirable that he should be able to give effect to a technical objection, and having allowed it that there should be no remedy. True, if he disallows an objection, his decision is final; but then the popular

(1) Law Rep. 10 C. P. 476, at p. 482.

1880

GOTHARD v. CLARKE.

intention prevails, and the right person is returned. This Court can amend the error.

Edward Clarke, Q.C. (*Morton Daniel* with him), for the respondents. The nomination paper is defective and invalid. The 38 & 39 Vict. c. 40, s. 1, says that it shall be in form prescribed, and the note points out that the register number is to be inserted. The object is, that by reference to the register persons may ascertain readily whether those who subscribed the nomination paper were duly qualified. Here the right number is omitted and a totally wrong one put in. This was no mere clerical error, but the result of a failure to inspect the proper burgess roll. The form requires the right number, and a paper containing the wrong one is not "to the like effect." The Courts are strict in requiring these statutory provisions to be fulfilled. The defect in *Mather* v. *Brown* (1) was of the slightest kind, yet the Court, although reluctant, were constrained to hold it fatal to the nomination paper. In *Soper* v. *Mayor of Basingstoke* (2) the terms of the Act were complied with, as the situation of the property was sufficiently described, and it need not necessarily be described in the nomination paper by the same terms as those in the burgess roll. Although in this case no one was misled, the non-compliance with the Act was an insuperable objection, as in *Noseworthy* v. *Buckland-in-the-Moor* (3), where a merely formal objection was held good on the ground that the words of the Act were express. Secondly. The defect could not and cannot be amended. Section 13 of the Ballot Act, 1872, has no application to an invalid nomination paper. "Election" there does not mean such nomination, for how can a nomination paper "be conducted?" The "tribunal" mentioned is that which deals with the matter after the election, and not the returning officer. The meaning of the word "election" is apparent from the use of it in the second schedule to the Ballot Act, 1872, "Form of Notice of Parliamentary Election," stating that the returning officer will proceed to the nomination, and if there is no opposition, to the election of a member. That shews clearly the distinction between nomination and election. In declaring a nomination paper void, the

(1) 1 C. P. D. 596. (2) 2 C. P. D. 440.
(3) Law Rep. 9 C. P. 233.

returning officer was not declaring an election invalid. We do not ask the Court to do so. This is an application to review his decision. The circumstances of the case are not such as are contemplated by s. 13.

Sir Henry James, Q.C., replied.

Cur. adv. vult.

April 26. GROVE, J. At an election of aldermen for one of the wards of the borough of Stockport three persons, the respondents, were declared to be duly elected. The names of three others were refused by the mayor, on the ground that the seconder of the nomination had not opposite to his name in the nomination paper the right number which was annexed to his name on the burgess roll. His name was George Chapman, and instead of the right number, 695, the number 704 appeared on the nomination paper. That was by mistake—not a mere clerical error in inserting the number opposite to his name—but from a mistake in an incorrect proof of the burgess roll which had been consulted instead of the correct one.

The mayor rejected the nomination on the ground that the Act of Parliament had not been complied with.

The question depends mainly on the construction of the schedule in 38 & 39 Vict. c. 40, the Municipal Elections Act, 1875. Before that Act it was not necessary that the number on the burgess roll of the persons nominating should be affixed to their names on the nomination paper. But the First Schedule, Form 2, Nomination Paper, runs thus: "We, the undersigned, being respectively enrolled burgesses"—they must be enrolled—"hereby nominate the following person as a candidate at the said election." Then, after their names, abode, and description, come their signatures, the place for which is indicated thus, viz., "A. B.*" and below, with a corresponding asterisk, is the note. "* The number on the burgess roll of the burgess subscribing with the situation of the property in respect of which he is enrolled on the burgess roll." Although apparently there is some little slip in the position of the asterisk,—for it is clear that "A. B. of *" cannot mean "of 695," but "of such a place"—I think the meaning of the note is that the number and the proper number on the burgess roll shall be attached.

1880

GOTHARD v. CLARKE.

Whether the note is directory or imperative may be another question, although I fail to see any reason for saying that it is merely directory, for if so, great irregularities would occur in the preparation of these papers. There can be no doubt as to the meaning of the provision that the number of the burgess on the burgess roll, with the situation of the property in respect of which he is enrolled, should be inserted in the burgess roll. I listened attentively to the argument of Sir Henry James, but could hear no reason why the Act should not mean what it says, viz., that the number on the burgess roll should be inserted in the nomination paper. It is a new provision made for a good and sufficient reason. It is necessary that the person should be an enrolled burgess, and the statement of his number on the roll in the nomination paper is to enable persons to see whether those who nominate are actually enrolled and have the qualification which they assert in it. This is an obvious, simple, and useful provision. Then why is it to be ignored? Why is this number to be omitted, so that persons desiring to verify the qualification of subscribers to the nomination paper should have to search through the burgess roll and examine every name, without even then being sure that the result of the investigation is correct? For example, suppose the name subscribed to the nomination paper were John Smith; there may be a dozen "John Smiths" on the burgess roll. It would lead to great carelessness, and, if not mere mockery, be at least extremely inconvenient, if a number might be put opposite to a name subject to any correction by the mayor, which, at the election, would be too late. The object of the provision is that before the election persons should see whether the candidate is properly proposed, nominated, and assented to by enrolled burgesses. Far from being unimportant, it seems to me most essential. This construction is not narrow, as the learned counsel for the appellants more than once insisted that it would be. I see no reason why the proper figures should not be inserted in the nomination paper. The consequence of omitting or misstating them might be very serious. Suppose, for example, we said, as we are asked to say, that the number here was immaterial, because presumably it has not misled any one. The result would be that in every case the returning officer would have to enter on an inquiry whether the

wrong number had misled in fact, an inquiry both complicated in nature and unsatisfactory, because the decision of the mayor, if he were thought to be a partisan, would be cavilled at. The effect of our judgment would be to give the returning officer much trouble, protract the time of election, depart from the terms of the Act, and change a simple and sensible provision for a complex and difficult inquiry. When I say the error did not in fact mislead, I should add that there are two senses in which the word may be used. The error may or may not mislead in fact. Here it led nobody to believe there was not George Chapman on the burgess roll. But there may be misleading of another kind, with which I do not now deal. There may be a clerical error, such as by making the figure 9 with too short a tail so as to look like the cypher 0. It may be, although I do not give judgment on it, that the mayor is to treat that reasonably. There may be a clerical error which is obviously a mere clerical error ex facie. Or suppose the name Jones were written "Jone," the letter "s" being omitted. The mayor might perhaps be justified in treating that as the subject of correction. But here we have a real change of number. It is not "704" but "695"; not a figure is right, and there is no possibility of this being a mere clerical error.

Further, s. 2 enacts that the candidate shall be nominated in writing, and that "the writing shall be subscribed by two enrolled burgesses" of the borough or ward "as proposer and seconder, and by eight other enrolled burgesses of such borough or ward as assenting to the nomination." It is argued that this is imperative, but that the subsequent provision in the same section, "The nomination paper shall state the surname and other names of the person nominated, with his place of abode and description, and shall be in the form No. 2 set forth in the first schedule to this Act, or to the like effect," gives greater scope for variation.

Perhaps so; and if there had been some change of form, such as some inversion of the place of abode, that might be "to the like effect." But I fail to understand how "704" can be to the like effect as "695." It is evidently not "to the like effect." There is no similarity. It was assumed that the error did not mislead; but it must surely be likely to mislead.

1880

GOTHARD v. CLARKE.

Some cases were cited, of which I will only mention two.

In *Mather* v. *Brown* (1) the name of a candidate, Robert Vicars Mather, was inserted in the nomination paper as "Robert V. Mather." The defect was very slight, and much less likely to mislead than the substitution of 695 for 704 in this case. Moreover, the name was correct so far as it was stated. But the Court held that such statement of it did not satisfy the requirements of s. 1 and the form in the second schedule of the Act. There the defect was in the statement of the name of the person nominated. In *Howes* v. *Turner* (2) the Christian name of the proposer was abbreviated, and the nomination paper, nevertheless, was held good. The judgment does not in principle differ from that delivered in the preceding case, because the provision of s. 1, sub-s. 2, compliance with which was rightly insisted on in *Mather* v. *Brown* (1),—viz., for the statement of "the surname and other names" and not the mere signature of the candidate—does not apply to the nominator, whose signature would satisfy the requirement of the form that the nomination paper shall be "signed." I think the Court, in holding the signature to suffice, expressly followed out the intention of the Act. When it is said that a person signed an instrument, or, in a legal treatise the form of an agreement bears at the end of it the word "signed," the meaning is, not that the person's names must be written in full, but that the document shall be subscribed with his ordinary signature. The distinction seems to me to be obvious. The Act says, in the case of the candidate, that his "surname and other names" shall be in the nomination paper, and in the case of the nominators, that the nomination paper shall be signed. The first case is strongly in favour of our present decision. For if the insertion of the initial "V" for "Vicars" was a fatal mistake, much more so must be the insertion of the wrong number on the burgess roll.

Arguments were founded on extreme cases, and instances were given of misprints in the burgess roll. We are not called upon to decide such cases, but I should think that if the number actually on the burgess roll were inserted in the nomination paper it would suffice. At all events, it would make it easy for any one to ascertain whether the name was on both the burgess roll

(1) 1 C. P. D. 596. (2) 1 C. P. D. 670.

and nomination paper. Humanum est errare. We cannot lay down rules to guide persons so that they can never make mistakes.

I think in this case the provisions of the Act were not complied with, and that the mayor was right in giving effect to them.

It remains now only to notice 35 & 36 Vict. c. 33, s. 13, by which it has been said that the mistake can be rectified. On the view I take, no possible construction of that section could affect our decision, for the mayor held the election to be perfectly right, and so I do not see how that section can apply, which says "No election shall be . . . . by reason of non-compliance with the rules or any mistake in the use of the forms declared invalid"—but we are not about to declare the election invalid—"if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election." If the mayor's decision had been the reverse of what it was, it might have affected the result of the election. But his decision produced the right result. So I do not see how to apply the section. If "the tribunal having cognisance of the question" was the mayor himself, as has been argued, it would be extraordinary that the mayor should be able to declare the election invalid before it was completed, and to declare that a mistake in the nomination paper did not "affect the result of the election" which was not finished. Another argument on the fact that the word "election" means sometimes the "process of electing" was also addressed to us, but it is unnecessary to deal with it, because I decide that the election was valid, not invalid. The respondents are entitled to judgment with costs. The case assumes to declare what consequences as to costs shall follow our decision, but cannot take away our jurisdiction over them, and should not interfere with it.

LOPES, J. We are asked to declare the election of the respondents void, on the ground that the mayor improperly allowed the objection which was duly taken to the nomination paper of the petitioners. I think the decision of the mayor was right, and that the petition should be dismissed with costs. The mayor

1880

GOTHARD v. CLARKE.

held the nomination paper of the three petitioners bad, because the register number of George Chapman, the seconder of the petitioners thereon, was not the number appended to his name on the burgess roll, as completed on the 22nd of October preceding. On the nomination paper it was 695. On the burgess roll it was 704. It was found in the case that no person was or could be misled by the inaccuracy in the case of George Chapman, and that there was not, and could not be, any doubt as to his identity. The case depends on the construction to be placed on sub-s. 2 of clause 1 of 38 & 39 Vict. c. 40, and on the schedule therein referred to. [The learned judge read them.] We are asked to hold that the provision of the Act, so far as it relates to the insertion of the number in the burgess roll of the burgess subscribing, is directory only, and imposes no obligation, and this more especially as sub-s. 2 says, "The nomination paper shall be in the form No. 2, or to the like effect." I cannot understand how it can be seriously contended the giving that which is absolutely wrong can be giving that which is "to the like effect." If, again, the insertion of a wrong number is not to invalidate the nomination paper, the failure to insert any number cannot render it insufficient. The insertion of a wrong number would be more misleading than the inserting no number. Again, if the insertion of the number in the burgess roll of the burgess subscribing may be dispensed with, why may not "the situation of the property in respect of which he is enrolled on the burgess roll" be omitted, and his mere ordinary signature be sufficient? It must be recollected that in the case of the nominating burgesses, unlike the case of the nominated, the surname or other names need not be stated; the ordinary signature would be enough. In this way the whole note to the schedule would be frittered away, and the security provided by the legislature for the identification of the subscribing burgesses be destroyed. It is said, however, that in this case George Chapman is so well known that no person would be misled, and that the case finds no person was misled. If this test was the one intended to be applied, the mayor in every case, when an objection like the present was taken, would have to hear evidence, and decide how far the inaccuracy was likely to mislead, or had misled; such loose proceeding never could have been contemplated

by the legislature, and the inconvenience of it is too obvious for argument.

I am of opinion the legislature intended to make obligatory the insertion of the register number in the nomination paper of the nominating burgesses, in order to afford to those whose concern it was to verify the nomination paper the readiest means of doing so, and that the inaccurate statement in the nomination paper of such register number invalidates the document. I entirely agree with the Lord Chief Justice when he said in *Mather* v. *Brown* (1), that in construing these Acts it is a duty with which the Court is entrusted to keep strictly to the Acts themselves.

It was contended by Sir Henry James that the defect in the nomination paper was cured by s. 13 of the Ballot Act, 1872, which is made applicable to the Municipal Elections Act, 1875, by 41 & 42 Vict. c. 26, s. 41, and that the mayor ought so to have held, and disallowed the objection. I cannot adopt that view, and am clearly of opinion that the 13th section of the Ballot Act, 1872, was never intended to apply to any questions arising before the mayor, but refers to a time subsequent to a return by the mayor when the election is completed. The words of the section are too clear to permit of any doubt.

But it is also contended (even if that 13th section does not refer to the proceedings before the mayor) that this Court now ought to hold the defect cured, and declare the election of the respondents void. I cannot agree with this contention. I doubt if that section applies to a case like the present, but I am clear it cannot apply when the defect is a matter of substance affecting the result of the election, as in the present case.

I quite agree with the observations of my Brother Grove as to the costs.

Judgment for the respondents.

Solicitors for petitioners: *Hopwood & Sons.*
Solicitors for respondents: *Beal & De Soyres.*

(1) 1 C. P. D. 596.

1880
May 6.

CHESWORTH *v.* HUNT and Another.
HARRISON, Claimant.

Bill of Sale—Consolidation of Mortgage with—Execution Creditor—Right to Surplus Proceeds of Goods after discharging Bill of Sale.

The doctrine of consolidation of mortgages does not enable the grantee by a registered bill of sale of goods seized under a fi. fa. to tack a prior mortgage of other property of the grantor, and claim that the surplus proceeds of the goods, after discharging the sum secured by the bill of sale, shall be applied in satisfaction of the prior mortgage, so as to defeat the right of the execution creditor to such surplus.

Special Case stated by order of the district registrar for Liverpool.

By an indenture dated the 1st of May, 1879, and made between the defendants of the one part and the claimant of the other part, the defendant, George Hunt the elder, conveyed to the claimant leasehold premises, and the defendants conveyed to the plaintiff freehold premises for securing 235*l.* 17*s.* 5*d.* then due to the claimant from the defendants, and also the amounts of three bills of exchange, and also such other moneys as might be advanced by the claimant to or on account of the defendants or become due from the defendants to the claimant, and the deed contained a proviso for reconveyance on repayment of the sums and amounts aforesaid.

The defendants did not pay the bills of exchange, and the claimant was holder thereof, and all the sums mentioned in the mortgage were due and owing from the defendants to the claimant, together with further advances.

By indenture or bill of sale dated the 25th of September, 1879, and made between the defendants of the one part and the claimant of the other part, in consideration of 40*l.* the defendants assigned to him all the machinery, plant, stock-in-trade, and other articles then in or about the yard and shop of the defendants, 133, Grafton Street, Liverpool, and particularly specified in the schedule thereto; and the bill of sale contained a proviso for re-assignment on repayment of the 40*l.* with interest.

The bill of sale was duly registered on the 27th of September, 1879.

The defendants remained in possession of the goods comprised in the bill of sale, and on the 1st of October, 1879, the same were seized under a writ of fi. fa. issued upon a judgment obtained by the plaintiff in this action. The writ of fi. fa. was indorsed to levy 49*l.* 19*s.*, including costs of levy.

The claimant thereupon claimed the goods as his by virtue of the bill of sale, and the sheriff took out an interpleader summons, which was heard before the district registrar, who ordered that the sheriff should sell the goods without prejudice to any question, and after deducting expenses of sale should pay 40*l.* and interest to the claimant, and the balance of the sale moneys into Court, and that the plaintiff and claimant should state a special case, as to whether the claimant was at the time of the levy entitled to a lien or charge or right to consolidate upon the goods seized in respect of his securities other than the bill of sale.

The sheriff accordingly sold the goods, and out of the proceeds paid to the claimant 40*l.* 2*s.* 3*d.*, and paid into court the balance of 44*l.* 8*s.* 6*d.*

The claimant claimed that he was at the time of the levy entitled to consolidate the securities created by the indentures of the 1st of May and the 25th of September, 1879, and that the defendants were not at the time of the levy entitled to redeem the security created by the bill of sale, without at the same time redeeming the security created by the indenture of the 1st of May, 1879, and that the plaintiff and the sheriff could be in no better position in that respect than the defendants, and therefore were not entitled to sell or deal with the goods comprised in the bill of sale, except upon the terms of their previously redeeming both of the claimant's said securities.

The claimant contended that the sum of 44*l.* 8*s.* 6*d.* in court, subject to the payment of costs, ought to be paid to the claimant in reduction of the principal and interest due to him and secured by the indenture of the 1st of May, 1879.

The amount due to the plaintiff under the judgment exceeded 44*l.* 8*s.* 6*d.*, and he disputed the claimant's right as against the plaintiff to consolidate the securities, and denied that the bill of sale was, at the time of the levy, as against him, the execution

1880

CHESWORTH v. HUNT.

creditor, a greater security over the goods and chattels comprised therein than was expressed in the bill of sale, and claimed that the moneys in court ought to be paid to the plaintiff in part satisfaction of his judgment.

The question was, in what manner ought the proceeds in court of the sale of the goods comprised in the bill of sale to be applied as between the claimant and the plaintiff.

A. Leach, for the claimant. According to the doctrine of consolidation the claimant is entitled to tack his mortgages and to insist that one shall not be paid off without the other: *Fisher* on Mortgage, 3rd ed. p. 639; *Marsh* v. *Lee*. (1) The rule applies to equitable mortgages, such as his first one was, and whether the mortgagee is coming to foreclose or the mortgagor to redeem. "The incumbrancer may also unite securities of different natures, as an assignment of equitable personalty with a mortgage upon freeholds and leaseholds": *Fisher* on Mortgage, 3rd ed. p. 639, and in a note the author says there seems no doubt on the point: *Watts* v. *Symes* (2); *Farebrother* v. *Wodehouse* (3); *Spalding* v. *Thompson* (4); *Selby* v. *Pomfret*. (5) "An equitable mortgagee has the same protection as any other cestui que trust against the subsequent judgment creditor, because a judgment creditor takes the property of his debtor subject to all the equities which affect it, including the rights of an equitable mortgagee; which are absolute and complete as between himself and the mortgagor ...." *Fisher* on Mortgage, 3rd ed. p. 665; *Langton* v. *Horton*. (6) There is no hardship on the execution creditor, who must be assumed to have known that his rights were liable to the contingency of the coalescing of the two mortgaged estates. See per Wood, V.-C., in *Beevor* v. *Luck*. (7)

The Bills of Sale Act, 1878, 41 & 42 Vict. c. 31, does not expressly overrule the doctrine of consolidation, which apart from that Act would clearly apply. The plaintiff intimates that he will rely on ss. 8, 10, and 15. The requirements of s. 8, that the bill of sale "shall set forth the consideration" have been com-

(1) 2 Vent. 337; 1 W. & T. L. C. (5th ed.) 674.
(2) 1 De Gex, M. & G. 240.
(3) 23 Beav. 18. 2 Jur. N.S. 1178
(4) 26 Beav. 637.
(5) 3 De Gex, F. & J. 595.
(6) 1 Hare, 549.
(7) Law Rep. 4 Eq. 537, at p. 546.

plied with, for the consideration was the 40*l.* and not the past debt, although directly the bill of sale was given the right to tack arose. The principle of consolidation creates no "defeasance" or "condition" within the meaning of s. 10, sub-s. 3. Nor do the terms of s. 15 apply. Moreover, they are permissive and not peremptory. The words in the interpretation clause, s. 4, that "bill of sale" shall include "any agreement.... by which a right in equity to any personal chattels or to any charge or security thereon" were not meant to apply to this case, but to such an one as *Langton* v. *Horton* (1); and *Ex parte Conning, In re Steele* (2); *Ex parte Mackay, Ex parte Brown, In re Jeavons.* (3) A bill of sale does not merely confer a right in equity but is a legal mortgage. The Act does not impliedly overrule the doctrine of consolidation. There is nothing in the policy of the Act to do so. But if there were, the doctrines of equity sometimes infringe upon the policy of statutes, as for example on the Statute of Frauds and the Registration Acts: See notes to *Le Neve* v. *Le Neve*, 2 W. & T. L. C. (5th ed.) at p. 45.

The claimant is entitled to have the money paid over to him to be applied pro tanto in satisfaction of the prior securities. Why should an execution creditor who is merely a general creditor be preferred to a secured creditor who has been most diligent? One of the two must suffer. It is just that the loss should fall on the former.

Ffrench, for the plaintiff, was not heard.

DENMAN, J. Our judgment must be for the execution creditor, notwithstanding the able argument of Mr. Leach, who has doubtless brought before us all the authorities which bear on the case. The claimant's whole title is derived from a registered bill of sale held by him, and under which he claims all the goods and chattels in possession of the judgment debtors at the time when the fi. fa. was executed. The proceeds of those goods are more than sufficient to satisfy his bill of sale, and it is admitted that he is entitled to realize the amount secured by the bill of sale.

(1) 1 Hare, 549. (2) Law Rep. 16 Eq. 414.
(3) Law Rep. 8 Ch. 643.

1880

CHESWORTH v. HUNT.

But he argues that he is entitled, not only to the amount due under the bill of sale, but also to satisfaction out of those proceeds, so far as it can be got, for moneys due on the security of freeholds and leaseholds contained in a mortgage granted to him some time before the execution of the bill of sale. I think that we could not yield to this contention without entirely ignoring the whole spirit, substance, and meaning of the provisions of the Bills of Sale Act, 1878. His title is under the bill of sale, and if there were no bill of sale he would have had no right to touch the goods. They were not secured to him by any other instrument. But he contends that the doctrine of consolidation applies. That doctrine is somewhat unfamiliar in these courts, but fortunately my learned brother Lindley, who is as familiar with equity as with law, now sits beside me, and he will give his reasons for our judgment that the doctrine does not apply to this case. Assuming, however, that the doctrine might apply as between the execution debtors and the claimant, I think it by no means follows that where a claim is made under a bill of sale of goods, the claimant can necessarily get satisfaction out of those goods for sums which he has secured on real property by documents not affecting those goods. The Bills of Sale Act requires several conditions to be fulfilled in a valid bill of sale. The consideration must be truly set forth. In the bill of sale here the consideration is truly stated, and it would be a qualification of that statement if under the doctrine of consolidation the claimant were held to have a right to more than the sums stipulated for in the instrument. That certainly could not have been contemplated by the legislature when passing the Act. Then, again, the provisions in the early part of the Act defining a bill of sale, are wholly inconsistent with its being used for such a purpose as that for which the claimant seeks to use it. A bill of sale is according to the definition clause a document relating to personal chattels, and is to include certain things, but to exclude leaseholds and real estate. So if it were to have the effect which the claimant desires in the present case the scope of the Act would be altered. I decline to be party to extending the operation of the Act to such a case as the present unless compelled by authority applicable to it. On that ground alone I think our judgment should be for the execution creditor.

LINDLEY, J. I am of the same opinion. Without commenting on the propriety of the equitable doctrine of consolidation of mortgages, I take that doctrine as established; it has been settled a great number of years and now is not to be contradicted in courts of first instance or county courts; it is part of the law of the land. But, when asked to extend the doctrine, we must be cautious, and if asked to extend it so as to defeat the operation of an Act of Parliament, and especially the Bills of Sale Act, we must be still more cautious. The principle of the doctrine is that a person who comes into equity must do equity, and if he has a mortgage of 300*l.* on one estate and 600*l.* on another, and the time of redemption being past, the mortgagor comes to equity to redeem or the mortgagee to foreclose, the mortgagee is entitled to say, "I will not part with one estate until I am paid all owing to me on both." Of course he cannot say so if the mortgagor comes within the time limited by the deed for payment, in which case the equitable doctrine has no application, but if he has allowed that time to pass, and has no legal rights, then the equitable doctrine applies. True, on logical reasoning the doctrine of consolidation has been extended step by step until it has produced results which are to my mind monstrous; but still we cannot flinch from it, it is not our province to repeal or alter the law. Here, however, where a bill of sale is executed for 40*l.* and registered so as to be binding to that extent against execution creditors, and the security is worth more than the 40*l.*, so that there is a surplus, after paying off the bill of sale holder, for the execution creditor, we are asked to say for the first time that the execution creditor is not to have the surplus proceeds of the execution, because the holder of the bill of sale is the holder of another security on other property of the grantor. That seems so startling that I decline to take such a step except under pressure of superior authority. I will not be the first to take it. No authority exists which goes to that length or nearly so far. Therefore, I should say without hesitation, that we ought not to defeat an execution creditor by extending against him the doctrine of consolidation of mortgages when we see, as I do plainly, that it would be contrary to the scope of the Bills of Sale Act. It is unnecessary to go through the sections to shew that we should

1880

CHESWORTH v. HUNT.

render the Act nugatory in such a case as the present, where the bill of sale holder happens to have another security on land of the grantor, if we held that the securities might be consolidated so as to defeat the rights of an execution creditor who has seized the goods comprised in the bill of sale, which are more than enough to satisfy the amount due under it to the holder.

Judgment for the plaintiff with costs.

Solicitors for plaintiff: *Gregory, Rowcliffe, & Co.*
Solicitors for claimant: *Prior, Bigg, & Co.*

April 30.

THE SHANKLIN LOCAL BOARD, APPELLANTS; *v.* MILLAR, RESPONDENT.

Local Government Acts—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 150, 257—*Streets—Works therein—Apportionment of Expenses, how far conclusive—Deposit of Plans—No condition precedent.*

An apportionment of street expenses, made under 38 & 39 Vict. c. 55 (The Public Health Act, 1875), s. 150, and not disputed within three months from notice of it to the owner of the premises in respect of which the expenses were incurred, is binding and conclusive upon him by s. 257, and, therefore, in an action against him for the amount apportioned, the apportionment cannot be treated as a nullity merely because it mixed up the expenses of more than one street, and, in the opinion of the judge, reasonable opportunities were not afforded of inspecting the plans and estimate deposited according to s. 150, before the expenses were incurred.

The deposit of plans and an estimate is not a condition precedent to the recovery of such expenses.

CASE stated on appeal from the Ryde County Court.

The action was to recover 6*l.* 11*s.* 1*d.*, stated in the particulars of claim to be the "amount of the defendant's proportion (as settled by the surveyor to the plaintiff local board, and of which the defendant had had due notice) of the expenses incurred by the plaintiffs in the execution of the works mentioned or referred to in certain notices under the provisions of s. 150 of the Public Health Act, 1875, duly served upon the defendant on the 6th day of March, 1877, to level, pave, metal, and channel parts of certain streets called Osborne Road and Palmerston Road, within the district

of the Local Board upon which certain premises of which the defendant was the owner, front, adjoin, or abut, and which notices were not complied with by him."

At the trial the following facts were proved or admitted:—

The settlement of the boundaries of the district in 1863.

The adoption of the Local Government Act.

That at the time of the adoption of the Act the streets in question had not been formed.

That the bye-laws provided that the office of the board should be open on Mondays and Thursdays from 10 till 3.

That on the 6th of March, 1877, the plaintiffs served upon the defendant the two notices aforesaid.

That previous to the serving of the notices, a plan in accordance with the terms of s. 150 of the Public Health Act, 1875, was deposited at the offices of the plaintiffs, and also an estimate.

That the defendant failed to comply with the notices; and that the plaintiffs, in September and October, 1878, executed a certain portion only of the works required by the notices to be executed.

That the board's surveyor then made the apportionment of the expenses incurred by the board for levelling, paving, metalling, and channelling Osborne Road, Park Road, and Park Cross Road, or some or one of them, situate in the district of the local board of Shanklin.

That notice of the apportionment of the expenses incurred, so far as the defendant was concerned, was duly served on the defendant.

That no notice of his intention to dispute such apportionment was given by the defendant, and that no memorial had, in pursuance of s. 268 of the "Public Health Act, 1875," been addressed by the defendant to the Local Government Board.

Judgment for the defendant was given by the county court judge, on grounds of which the following only are here material, viz.:—

That the apportionment, being an apportionment of the expenses incurred in repairing five or more roads, was bad in law.

That the opportunities afforded to the defendant of inspecting the documents deposited were not, in the opinion of the county court judge, reasonable.

1880

SHANKLIN LOCAL BOARD v. MILLAR.

If the Court should be of opinion that on the facts as stated the decision was right, the judgment was to remain as entered for the defendant, but if the decision was wrong, judgment would be entered for the plaintiffs for the full amount claimed. [Copies of all the documents accompanied the case.]

Archibald, for the appellants. The apportionment was good on the face of it. Two streets were named in it, but the respondent owned premises on both.

[*Clerk,* for the respondent, said that the only points on which he relied were that the expenses of several streets were mixed up, and the finding of the county court judge that the opportunities afforded to the defendant of complying with the terms of the notice were not reasonable having regard to the bye-laws.]

Due notice was given under 38 & 39 Vict. c. 55, The Public Health Act, 1875, s. 150, and by s. 257 unless the apportionment is disputed within three months from notice of it to the owner of the premises it is binding and conclusive. This apportionment was not disputed within the time specified. Therefore the county court judge was wrong in entertaining objections to the preliminaries. Of course if the street were a highway repairable by the inhabitants at large, the apportionment was not authorized by the statute: *Hesketh* v. *Atherton Local Board.* (1) But this street was not such a highway. The apportionment was conclusive: *Nesbitt* v. *Greenwich Board of Works.* (2) The functions of the county court judge were, as regards the validity of the apportionment, simply ministerial: see per Cockburn, C.J., and Blackburn, J. *Cook* v. *Ipswich Local Board of Health.* (3)

Clerk, for the respondent. The apportionment was a nullity. The estimate was for the expenses incurred in five streets, on only two of which were premises belonging to the respondent; but the whole expenses were lumped together, and he was assessed according to his frontage, irrespective of the width of the streets. Even if the expenses of the two are mixed up, he cannot ascertain if he is rightly assessed, as the width of each may differ, and also the cost of work in different streets. In *Cook* v. *Ipswich Local Board*

(1) Law Rep. 9 Q. B. 4.
(2) Law Rep. 10 Q. B. 465.
(3) Law Rep. 6 Q. B. 451, at pp. 464, 467.

1880

SHANKLIN LOCAL BOARD v. MILLAR.

of Health (1) the expenses of two streets were lumped together, and the apportionment was held bad by the justices, and a fresh one made; it was argued in the Court of Queen's Bench that, having made one apportionment, the surveyor was functus officio, and could not make another. But the Court said no, as the first was an absolute nullity. Then if this apportionment was a nullity, there was no apportionment, and s. 257 does not apply. [He was stopped.]

Archibald, in reply. In *Cook* v. *Ipswich Local Board of Health* (1) the question of nullity was taken before the justices acting as arbitrators, and therefore empowered to consider it. They did so, and decided that the first apportionment was bad, and therefore the Court of Queen's Bench treated it as a nullity.

[*Clerk*. The justices had only power to decide the question of amount.]

Secondly. A condition precedent under s. 150 of the Public Health Act, 1875, is that plans and an estimate of the works shall be deposited in the office of the urban authority, and notice thereof be given, and shall be open at all reasonable hours for the inspection of all persons interested therein. But the county court judge has found that the opportunities for inspection were not reasonable. Blackburn, J., in *Cook* v. *Ipswich Local Board of Health* (2), does indeed say, on a corresponding provision, s. 16 of 24 & 25 Vict. c. 61, s. 16, that the deposit of plans is not a condition precedent. This was, however, only a dictum, and the plans in that case were actually seen, as Mellor, J., pointed out. (3) If s. 150 does not create a condition precedent, frontagers would be without remedy should there be a failure to comply with it, and no appeal from a decision on this question would lie to the Local Government Board.

DENMAN, J. I think that this case might cause considerable difficulty in a higher Court, but having before us a decision of a Court of co-ordinate jurisdiction on the subject, I think we are bound to decide the question in one way, which is however not

(1) Law Rep. 6 Q. B. 451. (2) Law Rep. 6 Q. B. at p. 460.
(3) Law Rep. 6 Q. B. at p. 461.

1880

SHANKLIN LOCAL BOARD v. MILLAR.

free from doubt. Two objections were taken on behalf of the local board. First, it was said that because two or more streets were mixed up in it, and one sum was required to be paid by the apportionment, the county court judge was right in treating it as a nullity. I was at first much impressed by the language of Cockburn, C.J., in *Cook* v. *Ipswich Local Board* (1), where there had been an apportionment, or that which on the face of it appeared to be an apportionment, and it was objected to on the ground that the expenses of two streets had been lumped together. The objection came before justices acting as arbitrators, who had to consider whether the apportionment was fair and the amounts proper, and the apportionment was so drawn that they were unable to say whether it was fair or not; the Lord Chief Justice said "Upon objection being taken, and it being clear that the apportionment was one which could not be enforced, and was therefore practically a nullity, the surveyor made a fresh apportionment.... The first apportionment was a nullity, and could not be enforced; and that being so, it was not only in the surveyor's power, but it was his duty, to make a new apportionment." It does not seem to me that the Lord Chief Justice there intended to say that an apportionment which is otherwise good on the face of it is necessarily a nullity, and may be treated as such in any Court before which it may come, because two streets instead of one are included in the apportionment, but the learned Judge only meant this, viz.: that where that is the case, and the parties have come to the conclusion that the apportionment cannot be enforced, and the surveyor makes a fresh apportionment, the former one becomes a nullity in the sense that it cannot be enforced, and is useless for particular purposes, and cannot stand in the way of a good apportionment. This is, to my mind, the full extent of the decision, and it is not a decision that, if no steps are taken to set aside or dispute the apportionment on the ground that the party charged is not liable, it may be treated as a nullity when it comes before the Court. Mr. Archibald has, I think, fairly and soundly distinguished the case on that ground, and the decision is not against him but in his favour. The question turns on sects. 150 and 257. The appellants rely most on sect. 257, which says that

(1) Law Rep. 6 Q. B. 451.

when there has been an apportionment such apportionment shall be binding and conclusive on the owner of the premises unless within three months from service of notice on him of the amount settled to be due from him he shall by written notice dispute the same. If certain things have been done which were done here and there has been an apportionment, a strong primâ facie case of liability under it is made out, and, inasmuch as there is no authority to the effect that because an apportionment might have been set aside and treated as a nullity on the ground of being unfair, it may, when it comes before the Court, be treated as no apportionment at all, I think the able argument of Mr. Clerk must fail in this instance where there is an apportionment which might have been objected to on the ground that it was not fair. I do not think he can say it is no apportionment merely because it is in the case cited said that the first apportionment was a nullity. The second point is that the county court judge has found that reasonable opportunities were not given to the defendant of inspecting the documents deposited in the office of the urban authority. 38 & 39 Vict. c. 55, s. 150, enacts that before giving notice to the owners the urban authority shall cause plans, sections, and an estimate of the proposed works to be made, and that "such plans, sections, and estimate shall be deposited in the office of the urban authority, and shall be open at all reasonable hours for the inspection of all persons interested therein during the time specified in such notice." Without saying that some extreme case might not be put of such misconduct on the part of the authorities in this respect that they would not be held to have complied with the Act, it appears to me that there is none in the case before us. I think that the county court judge has not expressly found that the opportunities were reasonable or unreasonable, but has merely said that the opportunities of going to the office on Mondays and Thursdays, from 10 to 3, were not in his opinion reasonable. I do not think this requires us to hold that the whole proceedings were invalid for such a cause. It may be that greater opportunity of consulting the documents should be afforded by keeping the office open for a longer time and on more days, but on the question whether the office was open long enough during a particular week or at particular hours,

1880

SHANKLIN LOCAL BOARD v. MILLAR.

there is the dictum in *Cook* v. *Ipswich Local Board* (1), of Blackburn, J., who expressly says that this not a condition precedent; but, on the contrary, is a matter of discretion and of convenience, and that the provision is directory only for the purposes of carrying out the Act. I think that dictum is binding on us. It was directly applicable in *Cook* v. *Ipswich Local Board* (1) on a similar provision, and is as applicable to this case as to that. So I think that the mere opinion of the county court judge that the bye-law was unreasonable is no ground for our saying that the party sued on this apportionment was therefore entitled to raise the question of the reasonableness of the bye-law, and to upset the whole proceedings. There is no finding that the respondent was in any way prejudiced by it, or that he could not have taken all steps necessary for disputing the assessment. Perhaps he chose to lie by without taking objection to it because no objection to it on the merits could be made. The Court is not inclined to sanction that. I think the spirit of the Act is that the apportionment shall be binding unless unfair, and that there was nothing here to shew that this apportionment was unfair. I think the respondent was liable, and that the learned Judge was wrong in not so holding.

LOPES, J. I think the appellants are entitled to succeed. The respondent relies on two grounds for resisting payment of this sum of 6*l.* 10*s.* First, that the apportionment was a nullity, and, being a nullity, the county court judge was right in taking cognisance of it and deciding against the appellants. I think the objection was taken too late. I do not consider it necessary to express any opinion whether the apportionment was a nullity or not. I will assume that it was a nullity. Sect. 257 provides that, where the local authority have incurred expenses for the repayment whereof the owner of the premises in respect of which the same are incurred is made liable under the Act, and "such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority, or their surveyor, of the amount

(1) Law Rep. 6 Q. B. 460.

settled by the surveyor to be due from such owner, he shall by written notice dispute the same." I think the words "binding and conclusive" mean binding and conclusive for all purposes, and that the respondent ought to have taken that objection within the three months, and not having taken it within the three months he is now disabled from doing so. The policy of the provisions of this kind is obvious. The legislature naturally deem it most undesirable that these matters preliminary to an apportionment should be gone into after more than three months have expired, and there would be serious inconvenience to the authorities if it could be so. So the first objection fails. The second was that the opportunities of inspecting the documents deposited at the office were unreasonable. Here, again, I do not think it necessary to decide whether the opportunities were reasonable or not. I will assume that they were not reasonable. But even if the opportunities were not reasonable the objection could not prevail in the county court, unless they were rendered conditions precedent by the Act. We have the opinion of a very learned judge, Blackburn, J., in *Cook* v. *Ipswich Local Board* (1), on a provision in the Local Government Amendment Act, 1861, s. 16, as to deposit of plans: "Sect. 16 appears to be only directory; there is nothing to make the deposit of the plans a condition precedent, so as to make void the notices and prevent the expenses from being recoverable." That opinion is, as Mr. Clerk rightly said, a dictum only, but it is a dictum with which I do not hesitate to agree.

I think on these grounds that the appellants are entitled to succeed.

Judgment for the appellants with leave to appeal.

Solicitor for appellants: *Needham.*
Solicitors for respondent: *Wood, Latham, & Bigg.*

(1) Law Rep. 6 Q. B. 460.

1879
Dec. 17.

[IN THE COURT OF APPEAL.]

PHILLIPS *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Measure of Damages—Railway Accident—Loss of Profits of Trade or Profession —Misdirection.

In an action against a railway company for personal injury to a passenger, the jury in assessing the damages may take into their consideration, besides the pain and suffering of the plaintiff, and the expense incurred by him for medical and other necessary attendance, the loss he has sustained through his inability to continue a lucrative professional practice.

ACTION to recover damages for personal injury sustained by the plaintiff, a medical practitioner of eminence, through the negligence of the defendants' servants. The accident occurred in December, 1877.

At a trial before Field, J., the jury awarded the plaintiff 7000*l.* damages. The Queen's Bench Division directed a new trial, on the ground of the inadequacy of the damages, conceiving that the jury had failed to take into account all the heads of damage in respect of which the plaintiff was by law entitled to compensation; more especially the pecuniary loss, which he had sustained through his inability to practise his profession: *Phillips* v. *South Western Ry. Co.* (1) The decision of the Queen's Bench Division was affirmed by the Court of Appeal. (2)

The second trial took place before Lord Coleridge, C.J., during the present sittings at Westminster, when the jury awarded the plaintiff 16,000*l.* There was evidence that the plaintiff had a large private income.

In the course of his summing-up Lord Coleridge told the jury that, as there was no answer to the charge of negligence, the action was practically an assessment of the damages, which it was fair and reasonable that the defendants should pay to the plaintiff, by way of compensation for the injury which he had sustained: the amount of compensation was to be such as, the jury might think, would be fair and reasonable: it was difficult to lay down a

(1) 4 Q. B. D. 406. (2) 5 Q. B. D. 78.

definite rule, and the jury must determine the amount in the best manner in which they could. An absolute compensation was not the true measure of damages; they must be fair and reasonable. Compensation was made up of several ingredients, and in arriving at the total amount certain elements must be taken into account. One of these was the bodily pain and suffering, which the plaintiff had endured. Another, which might be termed a basis, was the loss of his professional income during the space of two years. For about three years before the accident the net annual earnings of the plaintiff had been about 5000*l.* But in this amount large presents or special fees from different patients were included, and it had been contended that these amounts were not likely to recur; but it was not likely that the confidence or generosity of the plaintiff's patients would have diminished; the patients might have continued to make presents of a similar amount, and if they should cease to do so, they would probably be followed by others equally generous; but this was a matter for the jury to decide. The plaintiff's income had been 5000*l.* a year on the average, and his practice had been increasing; from the time of the accident he had earned nothing, and for this very considerable compensation must be paid by the company. As to the amount of compensation to be awarded for the loss of future income, the jury must take into consideration the probability that for a year and a half or two years more the plaintiff would be debarred from following his profession. The negligence of the defendants had for a considerable time prevented the plaintiff from following his profession, and he would probably be prevented from resuming practice for some time to come.

Dec. 6. *Ballantine, Serjt.* (*Dugdale,* with him), for the defendants, moved for a new trial on the ground of misdirection, and also on the ground that the damages were excessive. The Lord Chief Justice misdirected the jury by omitting in his summing-up to call their attention to the fact, that the plaintiff was, at the time of the accident in the receipt of a private income, irrespective of the earnings derived from his professional practice, of between 3000*l.* and 4000*l.* a year.

[GROVE, J. On the first trial my Brother Field admitted the

1879

PHILLIPS v. LONDON AND SOUTH WESTERN RAILWAY CO.

evidence, but suggested to the jury that, though they might take that fact into their consideration, they must not give too much effect to it (1), and the Queen's Bench Division did not say that he was wrong. But I have grave doubts whether that was admissible at all. At all events, I am clearly of opinion that the omission to enlarge upon it to the jury does not constitute a misdirection.

LOPES, J. I do not understand this fact to have been withdrawn from the jury on this occasion. In strict law, I do not see how it could be made evidence.]

The damages here given are based upon an estimate of the loss of profits from the plaintiff's professional practice. That is not a rational and legitimate consideration for a jury in estimating the damages to be awarded for an accident of this kind; otherwise the sum to be awarded to a poor east-end apothecary of limited practice would be no adequate compensation for the loss and suffering which he would endure, and that without the sources of alleviation which would be at the command of a rich west-end physician. Assuming, however, the loss of profits to be an element which may be taken into account, there was nothing in this case to warrant the jury in giving such an extravagant sum as that awarded here,—assuming it to be true that the plaintiff's professional earnings in 1875, 1876, and 1877, averaged 5000*l.* a year. The jury were bound to take a reasonable view of all the circumstances, and should have limited their verdict to the sum which the defendants ought in fairness to be called upon to pay for the default of their servants, in a case where both the litigants were equally free from blame. It was a strong thing for the Court to interfere in a case where a jury had given so large a sum as 7000*l.*, and there was no suggestion that they were in any way misled or that they had acted hastily or perversely.

[GROVE, J. The Queen's Bench Division said the jury were wrong. We must assume that they thought the damages given on the first occasion were considerably too small. (2)

LOPES, J. It must be remembered also that the Court of Appeal was party to that strong decision. (3)]

(1) See 5 Q. B. D. 82. (2) 4 Q. B. D. 406.
(3) 5 Q. B. D. 78.

Hadley v. *Baxendale* (1), and *Theobald* v. *Railway Passengers Assurance Co.* (2), were referred to.

GROVE, J. I am of opinion that there should be no rule in this case. The Lord Chief Justice is not dissatisfied with the verdict, though he has expressed his willingness to have the principle, upon which the measure of compensation in these cases has usually been assessed, reconsidered upon the grounds suggested by my Brother Ballantine. There is nothing to shew that the Lord Chief Justice laid down the rule here in a manner different from that, in which it has been laid in former cases, which are very numerous. The plaintiff is entitled to receive at the hands of the jury compensation for the pain and bodily suffering which he has undergone, for the expense which he has been put to for medical and other necessary attendance, and for such pecuniary loss as the jury (having regard to his ability and means of earning money by his profession at the time) may think him reasonably entitled to. Now, looking to the condition of this gentleman,—a professional man whose earnings when in his usual state of health averaged 5000*l.* per annum,—and taking into consideration that the injury which he has sustained will in all human probability deprive him of the power of ever resuming his practice, and looking at the expense he has been put to in endeavouring to procure some alleviation of his sufferings, I cannot say that 16,000*l.* is too large a sum for the jury to award. If any principle could be laid down in the Court of Appeal, or by the House of Lords, or by the legislature, for ascertaining and determining the extent to which railway companies are to be held responsible in damages for such accidents, it might possibly be desirable. But we cannot deviate from the course adopted on former occasions in reference to these matters. As to the suggestion made by the learned serjeant, of the greater comparative hardship in the case of a poor apothecary, as contrasted with that of the opulent west-end physician, I can only observe that damages are awarded as a compensation for the injury and loss which the plaintiff has sustained; they are not to be given from motives of charity and compassion.

(1) 9 Ex. 341. (2) 10 Ex. 45.

1879

PHILLIPS v. LONDON AND SOUTH WESTERN RAILWAY CO.

Grove, J.

As to the other point, the only shadow of misdirection suggested is, that the Lord Chief Justice omitted to point out in a prominent manner to the jury that the plaintiff was possessed of a private income of 3000*l.* or 4000*l.* a year. As I have already said, I have very grave doubts whether that was properly a matter which the jury could take into consideration at all. My Brother Field, it seems, admitted evidence of that fact on the former trial, and the Court did not say that he had done wrong. But certainly my Lord's abstinence from adverting to it in his summing-up was no misdirection. Upon both grounds, therefore, I think there should be no rule.

LOPES, J. I also am clearly of opinion that, according to the law as it now stands and as it has been established by a long series of authorities by which we are bound, there has been no misdirection here, and the damages have been assessed upon the proper principle, and are not excessive. Great anxiety, no doubt, exists in the minds of many persons that there should if possible be some uniform and well-defined principle, upon which to estimate the compensation in damages to be paid by railway companies and others in cases of this kind. But we cannot speculate upon that. All we have to ascertain is, what is the existing law upon the subject. The plaintiff, besides a reasonable sum for the pain and suffering he has endured, and the expense he has incurred for medical and other necessary attendance during the period of his illness, has always been allowed to recover a fair recompense for the loss of profits of his profession or business during his enforced absence from it, whether temporary or presumably permanent. Adopting that as the established principle, how can we say that the sum awarded by the jury in this case, looking at all the surrounding circumstances, is either extravagant or unreasonable?

It is said that the Lord Chief Justice misdirected the jury, inasmuch as he failed to give due effect to evidence as to the private means of the plaintiff, independent of his professional earnings. I do not see how that can be called misdirection. That evidence was received on the first trial, and was left by my Brother Field to the jury; but he at the same time told them that they ought not to attach much importance to it. I do not think it was

admissible at all. But clearly it is no misdirection to omit to call the attention of the jury to every part of the evidence given in a cause.

The defendants moved in the Court of Appeal.

Dec. 17. *Ballantine, Serjt.* (*J. Brown, Q.C.*, and *Dugdale*, with him), for the defendants. The jury appear to have taken the amount of the plaintiff's income as the basis upon which the damages should be assessed; but the pecuniary position of the plaintiff, independently of his professional income, ought to be taken into account. The direction of Lord Coleridge comes to an unreasonable result: a surgeon with a small practice will receive a small amount of compensation, whereas a physician with a large practice will receive a large amount, though they have paid the same fare. It is submitted that the action is for breach of an implied contract to carry the plaintiff safely; and upon the principle of *Hadley* v. *Baxendale* (1) the defendants ought not to be held liable to compensate the plaintiff for the loss of an income, of which they had no notice at the time of entering into the contract. That case, no doubt, related to the carriage of goods, and has not as yet been extended to the carriage of passengers; but the reason probably is that there have been few, if any, cases in which damages of so large an amount as those in the present case have been awarded. The Lord Chief Justice did not call attention to the circumstance that the plaintiff was possessed of a large private income; and this was a misdirection, for the jury ought to take into account all circumstances tending to diminish the damages: *Rowley* v. *London and North Western Ry. Co.* (2) The loss of the professional income was too remote and ought not to have been taken into account: *Hobbs* v. *London and South Western Ry. Co.* (3); in the ordinary course of the defendants' business injury to a passenger is not accompanied by the loss of a professional income, and therefore damages for the temporary loss of profits cannot be recovered by the plaintiff: Mayne on Damages, c. 2, p. 19 (3rd ed.). Moreover, the Lord Chief Justice did not point out to the jury, that the special fees received by the

(1) 9 Ex. 341. (2) Law Rep. 8 Ex. 221.
(3) Law Rep. 10 Q. B. 111.

1879

PHILLIPS v. LONDON AND SOUTH WESTERN RAILWAY CO.

plaintiff were a precarious source of income and ought not to be estimated in assessing the damages.

BRAMWELL, L.J. I am of opinion that there should be no rule.

I will deal first with the last objection that has been alleged namely, that Lord Coleridge directed the jury that they must take 5000*l.* as the net income, and that they must not make any deduction for special emoluments, which may be called a source of precarious income. If Lord Coleridge had so directed the jury, his summing-up would have been inaccurate, because the jury would consider that in coming to an average the special emoluments could not be treated as profits as they might not happen again. On the other hand, I am quite certain that in the computation they ought not to be wholly excluded; the right course to follow is to include the possibility and probability of their recurrence. A physician may not be able to point out any patient who is likely to present him with another sum of 500*l.*, but the probability is that in the course of his life he will receive other presents of the same, or, at least, of a large amount. The jury must take into account that these presents are precarious. Lord Coleridge did not withdraw that circumstance from the jury, but gave them what in my opinion was a most proper direction.

I will now proceed to discuss the main question which has been argued before us. In many cases where a complaint is made of the amount found by the jury, it is impossible to get at the elements upon which the computation was made: if the case before us had been of that description, I should say that as Lord Coleridge who tried the case, and the judges of the Common Pleas Division are satisfied with the finding at this, a second trial, it would require a very strong case to induce me to set aside a finding so given. A case is nearly always better tried upon a second than upon a first trial, the points in dispute being better understood. Even if we could not determine upon what ground the jury proceeded, I should think that there is nothing so clearly wrong in what the jury have done as to induce us to disregard the opinions of all those before whom the case has previously come. But we need not deal with this case on such considerations, for we

can judge upon what ground the jury did proceed, namely, they gave 1000*l.* as compensation for the plaintiff's bodily suffering, and they gave him three years' loss of income at 5000*l.* a year. I cannot say that I think that amount too much: the only misgiving which I have is, whether the jury ought not to have given more. At any rate the amount is not excessive. It is necessary to consider what is the proper direction to be given in a case of this description. I think that the direction of Lord Coleridge was such as is usually given and was right. I have tried as judge more than a hundred actions of this kind, and the direction which I in common with other judges have been accustomed to give the jury, has been to the following effect: "You must give the plaintiff a compensation for his pecuniary loss, you must give him compensation for his pain and bodily suffering; of course it is almost impossible for you to give to an injured man what can be strictly called a compensation; but you must take a reasonable view of the case, and must consider under all the circumstances, what is a fair amount to be awarded to him." I have never known a direction in that form to be questioned. I may take the common case of a labourer receiving an injury, which has kept him out of work for perhaps six months; his evidence may be that before the time of the accident he was earning twenty-five shillings a week, that during twenty-six weeks he has been wholly incapacitated for work, that for ten weeks afterwards he has been able to earn only ten shillings a week, and that he will not get into full work again for twenty weeks. The plaintiff will be entitled to twenty-five shillings for each of the twenty-six weeks, and to fifteen shillings for each of the ten and twenty weeks. He is also entitled to some amount for his bodily sufferings and for his medical expenses; and in this manner the compensation to be awarded to him is estimated. I have put a case where a definite term may be fixed upon within which the party injured will recover; but suppose a case in which no definite term can be fixed: in that case the direction to the jury is that they must consider for themselves how long the plaintiff will be incapacitated from earning his livelihood or practising his profession, but that they must take into account the chance of his losing employment if he had not met with the accident. Nevertheless the

1879

PHILLIPS v. LONDON AND SOUTH WESTERN RAILWAY CO.

Bramwell, L.J.

fundamental rule is to give the plaintiff a fair and reasonable compensation for his pecuniary loss. I have always understood that this was a right direction, and I never heard it questioned until to-day. I do not see any wrong or anomaly in it. It is argued that it has an unjust operation for the following reason: two passengers are carried upon the same journey for the same fare; if one of them is injured, he will obtain 10,000*l.* damages against the company; whereas if the other meets with an accident, he will obtain only 1000*l.* This result may be unreasonable as regards the passengers inter se, but it is not unreasonable between the company and the public. The company have taken their powers upon certain conditions; and one of them is that if they break their contracts to carry safely and securely (which may happen without any moral blame attaching to them) they shall make adequate compensation to the person injured. It may be that the passenger who recovers 10,000*l.* has paid too little for his ticket, and that the passenger who recovers 1000*l.* has paid too much: nevertheless together they have paid what is a compensation to the company for the risk which they undertake; and if the legislature should hereafter think fit to limit the liability of railway companies as to very large amounts, they ought at the same time to diminish the fare to be paid, part of which is insurance money. Therefore I do not think that an anomaly exists as between the passengers and the railway company. The defendants are liable by law to compensate the plaintiff, they had entered into a contract to carry him safely and securely; owing to a misfortune they have broken that contract, and they must indemnify him to a fair and reasonable amount for the loss sustained by him through failure to perform their contract.

I wish to say a few words as to *Hadley* v. *Baxendale*. (1) An entire dissimilarity exists between that case and this. In that case the cause of action was for delay in the delivery of a chattel, and the plaintiff claimed damages not for injury done to the chattel itself, but for loss consequential upon the delay, which had been proved. In the present case the plaintiff claims damages for injuries done to himself whilst being carried as a passenger;

(1) 9 Ex. 341.

they are not to be assessed upon the same footing, as if he were suing for compensation in consequence of his non-arrival at a particular place at a particular time. *Hadley* v. *Baxendale* (1) bears no analogy to the present case. From another point of view the carriage of goods does present a certain analogy to the present case: a parcel is delivered to a railway company to be carried from one station to another and is lost during the transit; if it contains cotton they may have to pay 5*l.*, if it contains silk they may have to pay 500*l.*, and yet the sum charged for the carriage may be the same. This would be the position of a railway apart from the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), which gives them a right to charge some additional sum by way of insurance on a declaration being made of the nature of the goods delivered to be carried. Of course there are many valuable articles which are not within the Carriers Act, and if any of these are lost upon a railway, the company are liable for the full value, although they may receive only the same sum as for carrying an article of small value over the same distance.

In conclusion I have only to observe that Lord Coleridge in the present case followed the ordinary form of summing-up, and that there is no ground for supposing that the jury have given any amount beyond what the summing-up warranted. I think, therefore, that we must refuse this rule.

BRETT, L.J. The present case raises a question which I have often been called upon to consider in similar cases, and I have come to the conclusion that the direction of Lord Coleridge was right according to the recognised principles of law. The action is for breach of a contract to carry a passenger safely and securely, and the only damages which can be obtained are damages for the breach of that contract. The fundamental proposition no doubt is, that the plaintiff is to receive such damages as will compensate him for the injury ensuing from the breach of the contract. That injury is of a complicated nature; the plaintiff has received a bodily hurt, and also he has sustained a pecuniary loss.

As has been already stated by Lord Justice Bramwell there has been for years a recognised mode of leaving the question of

(1) 9 Ex. 341.

1879

PHILLIPS v. LONDON AND SOUTH WESTERN RAILWAY CO.

Brett, L.J.

damages to the jury, and in the present case Lord Coleridge in effect told the jury that the compensation was to be such as they might think fair and reasonable, but that they must not attempt to give an absolutely perfect compensation with respect to the pecuniary loss. I apprehend that both those propositions are correct, and that the reason why this general mode of leaving the question to the jury is right, is that human ingenuity has not been able to devise a more correct proposition, and that if a judge tries to make a perfect proposition, he either states something which is wrong, or omits to state something which ought to be stated. It was in effect decided in *Rowley* v. *London and North Western Ry. Co.* (1) that it is a misdirection to tell the jury that they ought to try to give a perfect compensation: by that I apprehend was meant a perfect arithmetical compensation, and the reason is that it is impossible to bring before a jury all the circumstances which would entitle them to come to a conclusion of that kind. In that case the Lord Chief Baron had tried to direct the jury to give a perfect compensation, by telling them to calculate an annuity which would produce for a certain number of years, or for such a number as they might think necessary, the sum which they thought the mother of the deceased had been deprived of by his death. The Court of Exchequer Chamber were of opinion that this attempt to give a nearly perfect compensation was wrong, because a jury must necessarily leave out a multitude of circumstances, which they ought to take into consideration in order to estimate a perfect compensation, but which no human ingenuity and no evidence could bring before them. We are therefore bound by a decision of the Court of Exchequer Chamber, which was of co-ordinate jurisdiction with the present Court of Appeal, to hold that the direction of Lord Coleridge was right, and I may add that apart from any decision I am of opinion that no fault can be found with it. As I have already intimated, it has long been recognised as a proper mode of summing up to tell the jury to give such compensation as under all the circumstances they may think fair and reasonable, and at the same time in order to assist them, to point out some circumstances which they ought to consider. When the jury have to give compen-

(1) Law Rep. 8 Ex. 221.

sation for the loss of a professional or trading income, the chief points to be considered are the amount of that income and of what it is made up. It has been in effect suggested by the counsel for the defendants that the amount of the income at the time of the accident ought not to be taken into account. This suggestion seems to me erroneous. If Lord Coleridge had told the jury as matter of law that it must be presumed that during the time which had elapsed since his accident the plaintiff would have made 5000*l.* a year, I should have thought it a misdirection, because if he had remained well many circumstances might have arisen to prevent him from making that income. But I apprehend that Lord Coleridge did not so direct the jury; he in effect told them that they would have to consider what income upon taking an average the plaintiff had been making, that that income appeared to be 5000*l.* a year, and that unless they could see circumstances which would probably have made it less, they might well assume that he would have continued to make 5000*l.* a year. I apprehend that this direction was correct. Bramwell, L.J. has described how the earnings of a working man ought to be dealt with. I agree with his view subject to this remark, that his description assumes that no circumstances existed, which would have prevented the working man from earning the same wages during the time when he was in fact disabled. If the plaintiff had resided in Lancashire and had earned his livelihood by working at the mills there, and if all the mills in Lancashire had been closed from the time of the accident, the jury would have to weigh that fact and consider whether he could have continued to earn his ordinary wages.

I have so far been speaking of the period between the time of the accident and the date of the trial. With regard to subsequent time, if no accident had happened, nevertheless many circumstances might have happened to prevent the plaintiff from earning his previous income; he may be disabled by illness, he is subject to the ordinary accidents and vicissitudes of life; and if all these circumstances of which no evidence can be given are looked at, it will be impossible to exactly estimate them; yet if the jury wholly pass them over they will go wrong, because these accidents and vicissitudes ought to be taken into account. It is true that the

1879

PHILLIPS v. LONDON AND SOUTH WESTERN RAILWAY CO.

Brett, L.J.

chances of life cannot be accurately calculated, but the judge must tell the jury to consider them in order that they may give a fair and reasonable compensation. It has been objected that the direction was wrong, because Lord Coleridge told the jury that the proved income was to be taken as the basis of compensation; if he had told them that that was the only basis, the direction would have been wrong; but Lord Coleridge merely said that the income was a basis, not the basis, of compensation. It is one circumstance, and to my mind the chief circumstance, to be taken into account in estimating the pecuniary loss.

It has been urged that an anomaly exists if Lord Coleridge's view is correct. According to it a surgeon with a small practice, who paid the same fare as the plaintiff, would have received 500*l.* for the same accident and the same personal injury, whereas the plaintiff has obtained 16,000*l.* It seems to me that the argument is fallacious. The surgeon with the small practice and the plaintiff would not suffer the same pecuniary loss, although the personal suffering may be the same. The former may have lost only 300*l.* by the accident, whereas the latter may have lost 1300*l.* No anomaly exists. In my opinion it would be right that a jury should give the same amount to a working man and to a person of great wealth for personal injury, if that is the same, and if the accompanying suffering is the same; that each should receive the expenses which he has properly incurred; but that in estimating the pecuniary loss, each should receive as nearly as possible only the amount of the loss which he has actually sustained. I think that no injustice flows from this mode of estimating the compensation. I repeat that the summing-up complained of was right, and that the ordinary mode of directing a jury in cases of compensation is correct and in future ought to be followed.

COTTON, L.J. I agree that there should be no rule in this case, and have little to add to what has fallen from the Lords Justices.

In such cases as this, when the plaintiff has established his right to a judgment against the company, he is entitled by way of damages to fair compensation for his suffering, and also for his pecuniary loss. The misdirection complained of in the present

1879

PHILLIPS v. LONDON AND SOUTH WESTERN RAILWAY CO.

COTTON, L.J.

case was with regard to the latter head of compensation. The contention of the defendants really came to this, that in estimating a fair compensation for the pecuniary loss, the actual income of the plaintiff should not be taken into account by the jury; in truth, that is to say, that in estimating a fair compensation for the pecuniary loss that ought to be disregarded which really constitutes the pecuniary loss. I say so, because the pecuniary loss consists of the loss of income, which the plaintiff, but for the accident, would have earned, and was prevented by the accident from earning. I am now dealing with the question whether the income which the plaintiff has been earning is to be wholly disregarded. In my opinion it is impossible to do so if compensation is to be awarded, not only for the bodily suffering, but also for the pecuniary loss. As the income is not to be excluded from the consideration of the jury, the question still remains whether, at the trial of this action, it was properly taken into account. In my view a fair compensation for the pecuniary loss is not to be arrived at by any arithmetical process; it cannot be said that the amount of the income being known, the loss is reduced to a mere matter of calculation. Lord Coleridge has not taken this course, but he has directed the jury to look to the nature of the income, the probability of its continuance, and the circumstances upon which it depended. The plaintiff is not to receive an annuity for the rest of his life calculated on the amount of his income; it was possible that he might have been disabled by illness or other causes from continuing to earn it; after taking into account the chances affecting the income, the jury were to say what, in their opinion, was a fair compensation for the disability, whether permanent or temporary, under which the plaintiff came of practising his profession and earning the income which he previously enjoyed. It may be said that this is to direct the jury to guess the amount to be awarded to the plaintiff, but it cannot be arrived at with mathematical certainty. In my opinion the jury must take into consideration as a basis, if not the basis, of their estimate, the income which the plaintiff was earning at the time of the accident, and determine whether its amount was permanent or accidental. In my opinion, Lord Coleridge's direction was correct; he told the jury that they must give a fair compensation for the pecuniary

1879

PHILLIPS v. LONDON AND SOUTH WESTERN RAILWAY CO.

Cotton, L.J.

loss. In my opinion, it would be wrong to exclude altogether the special fees; if a physician within a given time receives several large fees, it is certainly a matter for the consideration of the jury whether he would continue to get that income; special fees constitute an element which is not to be left out in ascertaining what is the pecuniary loss which the plaintiff has sustained by being debarred from following his profession.

I may mention one matter which has not been dealt with. It has been urged that independent income ought to be taken into account in estimating the pecuniary loss. I cannot agree to that. The fact that he has an independent income does not make the plaintiff's pecuniary loss less. As to bodily suffering, the possession of an independent income may come into consideration, because a man may suffer very much more from bodily injury when he is deprived of all means of support, and is reduced to such poverty that he cannot provide for himself what will alleviate his sufferings; he is in a different position from the man who, having an independent income, meets with a similar accident. A poor medical practitioner may probably be entitled to a larger compensation for his misfortune, because he has no private income out of which he may alleviate his sufferings. As to this, however, I do not express any definite opinion. I need only say, as to the present case, that in estimating the pecuniary loss the independent income of the plaintiff is not to be taken as a kind of set-off, so as to reduce the amount which the jury would otherwise award.

Rule refused.

Solicitor for defendants: *M. H. Hall.*

[IN THE COURT OF APPEAL.]

1880
April 20.

SCARAMANGA & CO. *v.* STAMP AND ANOTHER.

Ship—Deviation—Charterparty.

A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property.

The defendants' ship was chartered by the plaintiffs to carry a cargo of wheat from Cronstadt to the Mediterranean, the usual perils of the sea excepted. Whilst on her voyage she sighted and went to the assistance of a vessel in distress, called the *Arion*, and the master, in consideration of 1000*l.*, agreed to tow her into the Texel, which was out of his direct course. Whilst so doing the defendants' vessel was stranded, and ultimately (with her cargo) was totally lost. The jury found that it was not reasonably necessary to take the *Arion* to the Texel in order to save the lives of those on board her; but it was reasonably necessary to do so in order to save her and her cargo:—

Held, that the deviation was unjustifiable, and consequently that the plaintiffs were entitled to recover the value of the cargo against the defendants as owners of the ship.

APPEAL by the defendants from the judgment of Lindley, J., after trial. (1)

The facts of the case are stated in the judgment of Lindley, J., and also in the judgment of Cockburn, C.J., post, p. 298.

1879. Dec. 15. *Herschell, Q.C.*, and *Benjamin, Q.C.*, for the defendants. The question in this case is whether the owners of the steamship *Olympias* are liable for the loss of the cargo caused by a deviation. The alleged deviation consisted in towing a vessel in distress, named the *Arion*. It is unnecessary for the defendants to deny that deviation for the mere purpose of saving the cargo of another vessel in distress is unjustifiable: *Bond* v. *The Brig Cora* (2); and it may be admitted that those on board the *Arion* might have been saved simply by taking them on board the *Olympias*: nevertheless it is always reasonable to deviate in order to save those on board a vessel whose lives are in peril; and one question which ought to have been left to the jury is, whether the steps taken by the master of the *Olympias* were a reasonable mode

(1) 4 C. P. D. 316. (2) 2 Wash. C. C. 80.

1880

SCARAMANGA v. STAMP.

of saving those on board the *Arion*. It is in favour of public policy and for the benefit of maritime adventure that every inducement should be held out to save life.

[BRETT, L.J. Can that be a reasonable mode of saving life which is not absolutely necessary for that object?

BRAMWELL, L.J. It is always justifiable to make away with property in order to save life: *Mouse's Case.* (1) There is in this respect a wide distinction between life and property.]

Davis v. *Garrett* (2) is the only reported case in the English courts in which an action has been maintained by the owner of the cargo against the owner of the ship upon the ground of deviation; it is, however, plainly distinguishable, inasmuch as the deviation complained of in it was wholly wrongful. It is not disputed on behalf of the defendants that that case establishes that a wrongful deviation makes the owner of the vessel liable, although the same accident would have happened if there had been no deviation; but the decision has no bearing on the present action. There are, however, some dicta of English judges, which are in favour of the defendants. *The Beaver* (3) was a case of salvage; but Sir W. Scott, in delivering judgment, said (p. 294): "It is the duty of every king's ship, and indeed of every other ship, to give assistance, as well against the elements as against the enemy." The property saved was a vessel which had been rescued from the enemy. Dicta of a similar nature are to be found in the following cases of *Lawrence* v. *Sydebotham* (4); *The Waterloo* (5); *The Jane* (6); *The Deveron* (7); *The Orbona.* (8) It is true that these cases cannot be deemed binding authorities for the defendants, but they shew that it has never been decided, at least in an English court, that deviation even to save property is unlawful. If one vessel sees another with signals of distress flying, it is not a deviation if she goes to assist her.

[BRETT, L.J. In 1 Arnould on Marine Insurance, part 1, ch. 10, p. 502 (5th ed.) it is laid down that deviation in order to save life

(1) 12 Rep. 63.
(2) 6 Bing. 716.
(3) 3 C. Rob. 292.
(4) 6 East, 45, at p. 52, per Lord Ellenborough, C.J., and per Lawrence, J., at p. 54.
(5) 2 Dodson, 433, at p. 437.
(6) 2 Hagg. Adm. 338, at p. 345.
(7) 1 Wm. Rob. 180, at p. 182.
(8) 1 Spinks, 161, at p. 166.

is justifiable, but that this liberty does not extend to deviation to save property.]

It may be that deviation merely to save the property of others is unlawful: 1 Phillips on Marine Insurance, ch. 12, s. 11, pars. 1027, 1028, pp. 589, 590 (5th ed.); and if the crew of the *Arion* had been taken off, the *Olympias* could not have lawfully towed her: but whilst they remained on board, any reasonable measures might be adopted to save both them and the vessel. As the loss of the cargo happened through the perils of the sea, the burden of proof is upon the plaintiffs to establish that the defendants are liable for it. If the contention for the plaintiffs is right, it will follow that if the crew of a vessel in distress are taken off, the rescuing vessel must carry them to the end of her voyage, however distant her port of destination may be.

C. P. Butt, Q.C., for the plaintiffs. No doubt some authority may be found which appears to favour the proposition, that a vessel may deviate from her course in order to save life; but it is unnecessary for the plaintiffs to admit it to be true. In some of the cases to which reference has been made on behalf of the defendants, such as *The Orbona* (1), there appears to have been danger to life as well as to property. The effect of a deviation to save life and property has not been ascertained by decision in an English court: *Papayanni* v. *Hocquard* (2); *Carmichael* v. *Brodie* (3); and the question is treated doubtfully in 3 Kent's Com. part 5 lec. 48, pp. 312, 313. On the other hand, it is said in 2 Parsons on Marine Insurance, ch. 1, s. 5, p. 35, that "a delay for the purpose of towing a vessel is certainly a deviation, unless there are persons on board the vessel towed who can be saved in no other way." This is a proposition which is directly in point for the plaintiffs, and which, it is submitted, ought to be adopted.

Dec. 16. *Herschell, Q.C.*, in reply. By implication of law a ship may go out of her course in order to avoid capture, and this shews that in some cases deviation may be justified. If a ship may deviate in order to save life, surely she may do so in order to save property: the violation of the contract between the owner of

(1) 1 Spinks, 161. (2) Law Rep. 1 P. C. 250, at p. 254.
(3) Law Rep. 1 P. C. 454, at p. 461.

1880

SCARAMANGA v. STAMP.

the ship and the owner of the goods is not greater in the latter case than in the former.

[BRETT, L.J. It is contrary to public policy that a ship should not deviate in order to save life: for a vessel to go out of her course with that object is not a violation of the contract, that she shall proceed direct to the port for which she is bound.]

When life is in peril, every effort ought to be made to preserve it; and the means taken to ensure that object ought not to be criticised too nicely.

Cur. adv. vult.

1880. April 20. The following judgments were delivered:—

COCKBURN, C.J. This case comes before us on appeal from a judgment of Mr. Justice Lindley after a trial at nisi prius. The facts are not in dispute, and lie in a very narrow compass. The steamship *Olympias*, of which the defendants are owners, having been chartered by the plaintiff to carry a cargo of wheat from Cronstadt to Gibraltar, and having started on her voyage, when nine days out, sighted another steamship, the *Arion*, in distress, and, on nearing her, found that the machinery of the *Arion* had broken down, and that the vessel was in a helpless condition. The weather was fine and the sea smooth, and there would have been no difficulty in taking off and so saving the crew; but the master of the *Arion*, being desirous of saving his ship, as well as the lives of his crew, agreed to pay 1000*l.* to the master of the *Olympias* to tow the ship into the Texel.

Having taken the *Arion* in tow, the *Olympias*, when off the Dutch coast, on the way to the Texel, got ashore on the Terschelling Sands, and with her cargo was ultimately lost.

Under these circumstances the plaintiff claims the value of his goods, alleging that the goods were not lost by perils of the seas, so as to be within the exception in the charterparty, but were lost through the wrongful deviation of the defendants' vessel. The defendants plead that the deviation was justified, because it was for the purpose of saving the *Arion* and her cargo, and the lives of her captain and crew, the ship being in such a damaged condition that she could not be navigated.

That there was here a twofold deviation, which, unless the

circumstances were such as to justify it, would entitle the plaintiff to recover, cannot be disputed—in the first place, in the departure of the *Olympias* from her proper course in going to the Texel, secondly, in her taking the *Arion* in tow, which, in the three American cases of *Hermann* v. *Western Marine and Fire Insurance Company* (1), *Natches Insurance Company* v. *Stanton* (2), and *Stewart* v. *Tennessee Marine and Fire Insurance Company* (3), has been held to be equivalent to a deviation, and rightly so, seeing that the effect of taking another vessel in tow is necessarily to retard the progress of the towing vessel, and thereby to prolong the risk of the voyage. It is unnecessary to consider how far, if the loss had not been the consequence of the deviation, the mere fact of the deviation would render the shipowner liable to the goods owner for loss that ensued after it, as distinguished from its effect in a case of insurance; as there can be here no doubt that the loss not only occurred during the deviation, but was occasioned by it, there being the express admission of the master to that effect; and the case therefore comes within the ruling in *Davis* v. *Garrett* (4), the authority of which, so far as relates to a loss of goods occurring during the course of a deviation, has never been questioned.

It becomes therefore necessary to consider how far the grounds, on which the defendants seek to justify the deviation, can avail them in defence of the action. As regards that part of the plea which seeks to justify the deviation on the ground of its having been for the purpose of saving the lives of the crew of the *Arion*, it is obvious that the defence fails on the finding of the jury, who have found, and beyond question rightly, that the deviation was not reasonably necessary in order to save the lives of those on board. On the other hand, the jury have found that the deviation was reasonably necessary for the purpose of saving the *Arion* and her cargo. The question for decision, therefore, is whether, when deviation has taken place with the object, not of saving life, but of saving property alone, the shipowner will be exempt from liability to a goods owner whose goods have been lost through the deviation. Mr. Justice Lindley, before whom the cause was heard at nisi

(1) 13 Lo. R. 516.
(2) 2 Smed. & M. 340.
(3) 1 Humph. 242.
(4) 6 Bing. 716.

1880

SCARAMANGA v. STAMP.

Cockburn, C.J.

prius, gave judgment in favour of the goods owner, the plaintiff, and the case comes before us on appeal from his decision. I am of opinion that his decision was right and ought not to be disturbed.

It is a remarkable fact that, while the commerce and the mercantile marine of Great Britain have been for so many years the largest in the world, the question as to how far a deviation for the purpose of saving life or property is justifiable as against a goods owner or insurer, has never come before the tribunals of this country, so as to be authoritatively determined; while in the United States both questions have on several occasions come before the Courts, and the law may now be taken to be there settled by judicial decision, as well as by the consensus of jurists. In this country the question, with one exception, has only presented itself incidentally to that of salvage, and cannot be said even in that form to have been brought to the test of judicial decision. The exception in question is to be found in the case of *Lawrence* v. *Sydebotham* (1), in which the question of deviation to assist a vessel in distress was incidentally touched upon, but was not the point for decision. In that case Lawrence, J., says:— "As to deviations for the purpose of succouring ships at sea in distress, it is for the common advantage of all persons, underwriters and others, to give and receive assistance to and from each other in distress. But that," he continues, "was not the case here; the prize was in no distress." This observation, made to meet the argument of counsel, was altogether obiter dictum, the question in the cause having no reference to deviation at all, but being whether under a policy authorizing the taking of prizes in the course of a voyage, the shortening sail in order to remain by and protect a captured prize, was within the terms of the policy. The learned judge, it is to be observed, in no way explains what he means by the term "deviation," or the degree of assistance which is to be understood as to be given for what he terms "the common advantage." That the question of deviation was not before the Court, is apparent from the language of Lord Ellenborough, who, after stating what the point really was, says (2): "This does not affect the question how far slackening sail from

(1) 6 East, 45, at p. 54.

(2) 6 East, at p. 32.

motives of humanity to succour another ship in distress is allowable; nor is it necessary to touch upon it. Perhaps, when such a case does arise, it may be found for the general benefit of all insurers (and amongst others consequently for the benefit of those who may raise such an objection) to allow such succour to be given without imputing deviation to the succouring ship. It is not however necessary now to give any opinion on that point."

The other cases in which the question has incidentally arisen are all cases of salvage. In the case of *The Beaver* (1), there were conflicting claims, it being insisted on behalf of a king's ship that the ship saved had been a derelict, and had been saved entirely through the assistance of the king's ship. All that Sir William Scott says is, "With respect to the king's ship, I cannot admit the inflamed representation which has been made of their services. It is the duty of every king's ship, and indeed of every other ship, to give assistance, as well against the elements as against the enemy." How far that duty extended, or how far it would protect a shipowner from the consequences of a deviation, the learned judge does not say, nor does it appear to have been present to his mind.

In the later case of *The Waterloo* (2), in which salvage was claimed by the owners and crew of a ship chartered by the East India Company, for salvage services rendered to one of the company's own ships, and in which the claim was resisted on the ground that, by the terms of the charterparty and the instructions under which the ship sailed, no salvage could be demanded, Sir William Scott it is true says: "As to the instructions, they extend no further than to enjoin the duty of assisting other ships belonging to the company; but they do not express that this duty, which it is very proper to enjoin, shall receive no remuneration, whatever be the active merit, whatever be the suffering incurred in performing it. It is the duty of all ships to give succour to others in distress; none but a freebooter would withhold it; but that does not discharge from liability to payment where assistance is substantially given." Here again the learned judge is dealing with the subject of duty only so far as it affected the claim to salvage; with its effect in respect of deviation

(1) 3 Chr. Rob. 292. (2) 2 Dods. 433.

1880

SCARAMANGA v. STAMP.

Cockburn, C.J.

he had nothing to do. Yet it appears to have occurred to him that the deviation might not be without serious consequences in respect of the ship's insurance; for in fixing the amount to be paid for salvage, after dwelling on the merits of the claim, he adds, "Nor can I altogether lose sight of the dangers the ship thus incurred of vitiating her insurance, though that may be a questionable point."

In the case of *The Jane* (1), where the master of a whaler had gone with a boat's crew at the risk of their lives to the assistance of a vessel dismasted, and with the sea making a breach over her, and the crew of which had taken to the rigging as their last resource, it being urged on behalf of the owners that they had incurred the risk of forfeiting their insurance, the Court (Sir Charles Robinson) is said to have "entertained some doubt as to the positive forfeiture of the insurance in all cases by deviation to assist vessels in distress"—evidently looking upon the question as an unsettled and uncertain one.

In the later case of *The Orbona* (2), Dr. Lushington appears, indeed, to have taken a more decided view. Referring to the claim for additional salvage, on the ground of the fatal effect which the deviation might have had on the insurance, he says: "It is said that the insurance of the *Poictiers* was void. That is not true in law; for it is not the law that if one vessel goes out of her way to assist another in distress, the insurance is void." In support of which he refers to what was said by the judges in *Lawrence* v. *Sydebotham* (3), but which, as I have already shewn, affords no sufficient authority for the position in question.

In two more recent cases the Judicial Committee of the Privy Council appear, however, to have taken a more doubtful view of the subject than seems to have been entertained by Dr. Lushington in the case just referred to. In delivering the judgment of the Judicial Committee in *Papayanni* v. *Hocquard* (4), the risk run of vitiating the insurance having been urged as a reason for increasing the amount to be allowed for salvage, Dr. Lushington says: "With reference to the uncertainty in which the subject is involved, their Lordships have been invited to solve the

(1) 2 Hagg. 338.
(2) 1 Spinks, 161.
(3) 6 East, 54.
(4) Law Rep. 1 P. C. 250.

question. Their Lordships beg to decline that invitation. We are of opinion," he continues, "that this question ought to be raised, not incidentally before this, but directly before another tribunal, as the great question at issue, and there receive the most careful deliberation, until at last it comes to a final solution and is set at rest." He adds, however, that in considering the amount of salvage to be given, "The judge can never forget that there was possibly a risk incurred in respect of the vacating of policies, and in regard to actions which might be brought by owners of cargo."

In like manner, in the subsequent case of *Carmichael* v. *Brodie* (1), the Judicial Committee held that the claim of the owners of the ship should be considered with reference to "the doubt whether the insurance might not be vitiated, and whether the owners of the ship might not become responsible to the owners of the cargo for the acts of their servants in deviating from their course to render the assistance, and weakening the crew"—thus treating the question of law, as to the effect of a deviation for the purpose of rendering assistance, as unsettled and uncertain.

The case before us presents itself, therefore, so far as our Courts are concerned, as one of the first impression, on which we have to declare, or perhaps, I may say, practically, to make, the law.

I am glad to think that in doing so we have the advantage of the assistance afforded to us by the decisions of the American Courts and the opinions of American jurists, whom accident has caused to anticipate us on this question. And, although the decisions of the American Courts are of course not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of the law—a law, except so far as altered by statutory enactment, derived from a common source with our own—entitle their decisions to the utmost respect and confidence on our part.

It is, however, unnecessary to go through the American decisions in any detail. The effect of them is to be found in the well known text writers, but is nowhere better stated than in the judgment of Mr. Justice Sprague in the case of *Crocker* v. *Jackson*. (2) The

(1) Law Rep. 1 P. C. 461. (2) Sprague R. 141.

1880

SCARAMANGA v. STAMP.

Cockburn, C.J.

result of these authorities, immediately bearing on the question which we have here to decide, may be briefly stated.

Deviation for the purpose of saving life is protected, and involves neither forfeiture of insurance nor liability to the goods owner in respect of loss which would otherwise be within the exception of "perils of the seas." And, as a necessary consequence of the foregoing, deviation for the purpose of communicating with a ship in distress is allowable, inasmuch as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation.

If, therefore, the lives of the persons on board a disabled ship can be saved without saving the ship, as by taking them off, deviation for the purpose of saving the ship will carry with it all the consequences of an unauthorized deviation.

But where the preservation of life can only be effected through the concurrent saving of property, and the bonâ fide purpose of saving life forms part of the motive which leads to the deviation, the privilege will not be lost by reason of the purpose of saving property having formed a second motive for deviating.

In these propositions I entirely concur, as well as in the reasoning by which this view of the law is supported by Mr. Justice Lindley in his very able judgment. The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity, and is nowhere more salutary in its results than in bringing help to those who, exposed to destruction from the fury of winds and waves, would perish if left without assistance. To all who have to trust themselves to the sea, it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequences, which may result to a ship or cargo from the rendering of the needed aid. It would be against the common good, and shocking to the sentiments of mankind, that the shipowner should be deterred from endeavouring to save life by the fear, lest any disaster to ship or cargo, consequent on so doing, should fall on himself. Yet it would be unjust to expect that he should be called upon to satisfy the call of humanity at his own entire risk.

Moreover, the uniform practice of the mariners of every nation—except such as are in the habit of making the unfortunate their prey—of succouring others who are in danger, is so universal and well known, that there is neither injustice nor hardship in treating both the merchant and the insurer as making their contracts with the shipowner as subject to this exception to the general rule of not deviating from the appointed course. Goods owners and insurers must be taken, at all events in the absence of any stipulation to the contrary, as acquiescing in the universal practice of the maritime world, prompted as it is by the inherent instinct of human nature, and founded on the common interest of all who are exposed to the perils of the seas. What would be the effect of such a stipulation as I have just referred to, if it existed, it is unnecessary for the purpose of the present case to consider.

Deviation for the purpose of saving property stands obviously on a totally different footing. There is here no moral duty to fulfil, which, though its fulfilment may have been attended with danger to life or property, remains unrewarded. There would be much force, no doubt, in the argument that it is to the common interest of merchants and insurers, as well as of shipowners, that ships and cargoes, when in danger of perishing, should be saved, and consequently that, as matter of policy, the same latitude should be allowed in respect of the saving of property as in respect of the saving of life, were it not that the law has provided another, and a very adequate motive for the saving of property, by securing to the salvor a liberal proportion of the property saved—a proportion in which not only the value of the property saved, but also the danger run by the salvor to life or property is taken into account, and in calculating which, if it be once settled that the insurance will not be protected, nor the shipowner freed from liability in respect of loss of cargo, the risk thus run will, no doubt, be included as an element. It would obviously be most unjust if the shipowner could thus take the chance of highly remunerative gain at the risk and possible loss of the merchant or the insurer, neither of whom derive any benefit from the preservation of the property saved. This is strikingly exemplified in the present case, in which, not content with what would have been awarded to him by the proper Court on account of salvage, the master

1880

SCARAMANGA v. STAMP.

Cockburn, C.J.

made his own terms, and would have been paid a very large sum had the attempt to bring the *Arion* into port proved successful. It is obviously one thing to accord a privilege to one who acts from a sense of duty, without expectation of reward, another to extend it to one who neither acts from a sense of moral duty nor in obedience to what may be thought to be the policy of the law, but solely with a view to his own individual profit.

In the result, I am of opinion that though the deviation of the *Olympias*, so far as relates to her proceeding to the *Arion* in the first instance, was justified, the taking the latter in tow, and departing from the proper course in order to take the ship to the *Texel*, this not being necessary in order to save the lives of the captain and crew, was an unauthorized deviation; and the loss of the plaintiff's cargo having been the direct consequence of the deviation, or, to use the language of Tindal, C.J., in *Davis* v. *Garrett* (1), "the loss having actually happened whilst the wrongful act was in operation and force, and being attributable to the wrongful act," the defendants cannot avail themselves of the exception in the charterparty, and the plaintiff is, therefore, entitled to judgment. The appeal must, therefore, be disallowed.

I am authorized by my colleagues, Lord Justice Brett and Lord Justice Cotton, to say that they concur in the judgment I have just delivered.

BRAMWELL, L.J. I am of opinion that this judgment must be affirmed. The defendants have undertaken to the plaintiff to carry his goods from port to port without deviation, unless for cause justifying such deviation. The defendants have deviated, and so broken their contract unless they can shew such cause. Now the cause that will justify non-compliance with an undertaking may be express or implied in the contract itself, or added to it by usage or by some positive law. The cause alleged in this case is, that the deviation was a reasonable one to save a ship and her cargo from loss and destruction. It is certain that no law orders such a deviation. It is certain there is no usage, which adds to the contract a power to deviate for such cause. On the contrary, every opinion is against it, and it is certain that ships which

(1) 6 Bing. 716, at p. 724.

desire to have such a power, or one somewhat like it, expressly stipulate for it, as for example, for the right to tow vessels. As it is not expressed in the contract between the plaintiff and the defendants, the only remaining question is, can it be implied? Now, for my own part, I think it most objectionable to add to the contracts of parties that, which they could have added themselves had they been minded. It is to suppose they would have made the contract we make for them, had they only thought of it: a supposition very likely to be wrong. Still in some cases it is and must be done. It is said it must be in this case on the ground of public policy. That is to say, as I understand, that it is for the good of mankind in general, and so of Englishmen, that ships should, without liability to freighters, have power to deviate to save other ships and cargoes. Now I am by no means sure that that is so. I am by no means certain that more might not be lost than gained by such a power and its exercise. I am certain of this, that the best way to manage the matter is to leave parties to make their own bargains about it. Let the shipowner charge less freight where he reserves to himself the power, and more where he does not. I am also certain of this that even if the good of mankind and of this country in particular would be augmented by such a power, and by implying it in a contract, unless expressly excluded, we cannot imply it on the ground of public policy.

If public policy required such power should exist, a charter-party which expressly denied such power would be illegal and all its provisions void. Can that be maintained for a minute? Public policy requires the enforcement of certain rules, as that contracts shall not be illegal nor immoral, that they shall not be in restraint of trade, nor of personal freedom, that they shall not invite to the commission of crime, as an undertaking with a man to pay money to his executors if he commits suicide. But public policy would no more imply such a matter as this, and make its exclusion from a charter illegal, than it would make an agricultural lease unlawful, because some of the covenants were inconsistent with the most profitable use of the land.

I am of opinion, then, that the defendants have broken their contract without any sufficient excuse or justification, and that this action is maintainable.

1880

SCABAMANGA v. STAMP.

Bramwell, L.J.

It will be said that this is a very narrow ground on which to decide the case. It may be. But it is the only ground, and it is not my fault that that is narrow. After all the question is, had the defendants sufficient justification for breaking their promise? I say no, and that the plaintiff must recover.

The question whether a deviation to save life is justifiable is untouched by this opinion. That question depends on different considerations and different authorities.

Judgment affirmed.

Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*
Solicitors for defendants: *Crump & Son.*

April 8.

CHAPMAN *v.* KNIGHT.

Bill of Sale—By Equitable Owner—Prior Unregistered Bill of Sale—Grantor out of Possession—41 & 42 Vict. c. 31, s. 4—Practice—Appeal from County Court—Grounds of Judgment.

Goods were vested in a trustee with power to sell them upon the direction of his cestui que trust. The cestui que trust, with the authority of the trustee, executed and registered a bill of sale assigning the goods:—

Held, that the bill of sale was void as against execution creditors.

A judgment of the county court may, upon appeal, be upheld on other grounds than those on which the county court judge proceeded, if they appear and are admitted in his notes.

A county court judge decided that a registered bill of sale, given by a person out of possession of the goods assigned and deriving title from a grantee under an unregistered bill of sale, was invalid against an execution creditor.

Held by Grove, J. (Lopes, J. dissenting), that this decision was correct.

APPEAL from the Clerkenwell county court.

At the trial of an interpleader issue raising the question whether the plaintiff as execution creditor, or the claimant as holder of a bill of sale, was entitled to goods seized under a fi. fa. issued on a judgment recovered by the plaintiff against the defendant, the following facts appeared: On the 27th of June, 1879, the goods then being in a house occupied by the defendant Edward Henry Knight were in possession of the sheriff, who had seized them under a fi. fa. issued on a judgment recovered by one Bamberger against the defendant. The sheriff sold and formally delivered the goods to Oliver, a brother-in-law of Knight, and gave to Oliver an

inventory of the goods. At the foot of the inventory was a receipt signed by the sheriff's officer for 84*l.* 19*s.* 1*d.* paid to him by Oliver for the goods. The inventory and receipt were not registered as a bill of sale under 41 & 42 Vict. c. 31 (The Bills of Sale Act, 1878). On the 1st of July, 1879, Oliver by deed, in consideration of natural love and affection for his sister, Emily, the wife of Knight, assigned to Higgs the goods, an inventory whereof was annexed to the deed, in trust to permit the whole or any part of the goods to be used and enjoyed by Emily Knight during her life for her separate use independently of her husband, or upon the direction in writing of the said Emily Knight to sell the same or any part thereof in such manner as she should in writing direct. And if any part of the same premises should at the death of Emily Knight remain unsold, in trust to permit the same to be used and enjoyed by the said Edward Henry Knight, if he should be then living. And after the death of the survivor of them, the said Emily and Edward Henry Knight, in trust forthwith to sell the same in such manner as the trustees or trustee should think fit, and to hold the moneys produced by the said sale in trust for the executors or administrators of the said Emily Knight as part of her separate personal estate. This deed also was unregistered. On the 15th of August one Chapman recovered judgment against Edward Henry Knight for a sum due on a bill of exchange. On the 15th of September, 1879, Mrs. Knight wrote to her trustee Higgs, "Will you please give me an authority to dispose of the whole or any portion of the furniture settled upon me by Mr. Oliver." On the 16th of September, 1879, Higgs wrote to her, "I hereby authorize you to sell the whole or any portion of the furniture now in your possession, and which was included in the deed of settlement dated the first day of July last." On the said 16th of September, 1879, Mrs. Knight sold the goods to one Watson for 70*l.*, giving him an inventory and receipt signed by herself and attested by a solicitor. A copy of this inventory and receipt, together with an affidavit of the execution thereof, and of the description of Mrs. Knight and the attesting witness, was duly filed under the Bills of Sale Act, 1878. At the same time an agreement whereby Watson let the goods on hire at so much a month for eighteen months to Edward Henry

1880

CHAPMAN v. KNIGHT.

Knight, with a provision that if the monthly sums were paid the effects should become the absolute property of Edward Henry and Emily Knight, was also filed, accompanied by a similar affidavit under the Act.

On the 16th of September, 1879, the goods, which had remained in the possession of Edward Henry Knight, were seized in execution under the judgment recovered by the plaintiff Chapman against Knight, and were claimed by Watson, whereupon interpleader proceedings were taken, 46*l.* 12*s.* 10*d.* the debt and costs were paid into court by the claimant, and this issue was ordered.

Evidence of the identity of the goods was given, and the judge held that the identification was proved.

It was contended for the claimant that the settlement of the 1st of July, 1879, ought to have been registered, but the judge held that as it was not a claim by a creditor of Oliver (the original purchaser and settlor), registration of the settlement was unnecessary. It was also contended for the claimant that assuming the transaction of the 27th of June was within the Bills of Sale Act, 1878, the inventory and receipt of that date did not require to be registered in such a case as the present of a claim between Watson claimant and Chapman execution creditor, and were not the documents on which Watson relied for his title; that under the circumstances the transaction between Oliver and the sheriff did amount to a bill of sale, on the ground that Oliver was put into possession by the sheriff; and the claimant relied on s. 20 of the Bills of Sale Act, 1878, inasmuch as his title was derived under documents of the 16th of September, which had been duly registered.

It was contended for the plaintiff that the documents of the 27th of June ought to have been registered as they were the foundation of Watson's title: *Ex parte Odell. In re Walden.* (1) The county court judge found as facts that the goods in question were, on the 27th of June, in the house No. 3, Charteris Road, which was then occupied by Knight, the execution debtor; that such goods were then in the formal possession of the sheriff under a fi. fa. in an action of one Bamberger against Knight, that such goods were sold and the inventory and receipt of the 27th of June

(1) 10 Ch. D. 76.

given to Oliver in the execution of that process, and that possession was never given to Oliver; and the judge held that the inventory and receipt was a bill of sale within the Bills of Sale Act, 1878, and ought to have been registered as provided by that Act, and not having been registered was void, and he further found that, at the time of the levy at the suit of Chapman the goods were still on the premises No. 3, Charteris Road, and were in the apparent possession of Knight, the execution debtor, and his Honour held that Watson could stand in no better position than Oliver, and barred Watson's claim, and gave judgment for Chapman with costs to be taxed and paid by Watson, the claimant.

A rule nisi having been obtained to set aside this judgment and to enter judgment for the claimant,

Dec. 12, 1879. *R. V. Williams,* for the plaintiff, shewed cause. First. As the debtor remained in possession of the goods, a duly registered bill of sale was necessary to defeat the right of the execution creditor. Oliver must found his title on the inventory and receipt given by the sheriff. But those documents are included in the definition of "bill of sale," 41 & 42 Vict. c. 31, s. 4, and should have been registered under the Act. They were not registered, and therefore Oliver had no valid title to confer on Higgs by the settlement.

Secondly. Assuming Oliver's title, and consequently his assignment to Higgs, the trustee, to have been valid, the sale to Watson, although by inventory and receipt duly registered, was invalid. Higgs, who had the legal interest under the settlement, might have conveyed that interest to the purchaser. But instead of the trustee selling by authority of the cestui que trust, she sold by his authority.

Prosser, for the claimant, in support of the rule. First. Oliver's title was good. He bought of the sheriff, who was in possession. But even if the inventory and receipt given by the sheriff needed registration under the Bills of Sale Act, 1878, in order to be valid as against an execution creditor, the transfer of property by them to Oliver was complete, and no seizure by execution creditors took place before he assigned his property to Higgs.

1880

CHAPMAN v. KNIGHT.

Secondly. The duly registered assignment by the wife was good. She was the beneficial owner of the property. The trustee's power of sale was delegated to her.

This question was, by direction of the Court, re-argued.

Dec. 19. *Prosser*, for the claimant. The point that the inventory and receipt given on the sale to the claimant should have been signed by the owner in possession of the goods, and not by the wife, who had a mere beneficial interest in them, was not decided in the county court, and is not stated as a ground of the judgment. The judge was not asked to take a note of it, nor does it appear on his notes, and therefore the plaintiff cannot raise it now: *Rhodes* v. *Liverpool Commercial Investment Co.* (1)

R. V. Williams, for the execution creditor. The judgment may be supported on any sufficient ground appearing and admitted on the notes. Suppose, an action for the price of goods ordered for a company by an agent, whom the county court judge erroneously held not to have implied authority to order them, and judgment was accordingly given for the company, and it appeared on the notes that the order had been given by another agent with due authority, the Court on appeal could enter judgment for the plaintiff. Here, indeed, the judgment was rightly entered and should stand. The rule is only to enter judgment for the claimant. That cannot be done. It should have been for a new trial. In *Cousins* v. *Lombard Bank* (2) the Court assumed throughout that if it appeared on the notes that facts had been gone into raising a point of law, a new trial might be granted in favour of the defendant.

[LOPES, J. But ought not the point relied on to be presented to the county court judge? Suppose the appeal were by special case, could you argue questions not stated in it, and if not, can you raise new points on argument of a rule under 38 & 39 Vict. c. 50, s. 6?]

Yes, on facts appearing in the notes.

[LOPES, J. In *Eastland* v. *Burchell* (3) the Court availed themselves of the Judicature Act, 1875, Order XL., Rule 10, in

(1) 4 C. P. D. 425. (2) 1 Ex. D. 404.
(3) 3 Q. B. D. 432.

directing a judgment in the county court to be set aside and entered for the defendant.]

Under 13 & 14 Vict. c. 61, ss. 14, 15, the Court of Appeal from the county court is not confined to the precise questions submitted to them, but may decide upon the whole case as stated.

The evidence here is of possession by the execution debtor, a settlement of the goods by Oliver, having no title, on a trustee for the wife, and a registered inventory and receipt only signed by her. But the power was in the trustee to sell, and not in her.

Cur. adv. vult.

April 8. GROVE, J., after stating the facts, said: The county court judge held, that although the last bill of sale was registered, yet, as it was given by a person who had taken title from an unregistered bill of sale, it could not confer a better title than that derived from the unregistered bill of sale of the 27th of June, 1879, or the subsequent settlement of July, 1879, so that the last bill of sale was invalid as against the execution creditor. During the argument before us a point arose, on which the county court judge did not give an opinion, whether, even assuming that he was wrong on the question on which he decided the case, the registered bill of sale, not having been executed by the legal owner of the goods, was valid as against the execution creditor. A further question was also argued, whether, when a county court judge is asked to take a note at the trial, and does so, this court of appeal is limited to the point in the note, or can, if they see that the conclusion below was absolutely right on another point, give judgment upholding the judgment which is right? It was admitted that the Court can grant a new trial, but denied that they can enter judgment on a new point not dealt with in the county court.

I am of opinion that the county court judge was right on the point he decided. I had a doubt, which is weakened, but not altogether removed; and I believe my Brother Lopes doubts likewise. But on the second point we are both agreed that even if the county court judge were wrong on the first point, the bill of sale signed Emily Knight was not in proper compliance with the Bills of Sale Act, and although registered, was invalid, and that,

1880

CHAPMAN v. KNIGHT.

Grove, J.

therefore, the judgment against the claimant was right, and we have the power of upholding it. Where magistrates have given a reason for their decision which is unimportant, and their judgment has been right on other points, the superior Courts have upheld their decision, on the ground that it would be absurd to send the case back to the justices when they had all the materials before them for a right decision, although the reasons given were wrong. I see no cause why that should not be done in the present case, and find nothing in the County Courts Act to prevent it. By s. 6 the person intending to appeal must request the county court judge to take a note of any point of law, and the judge is bound to take a note of the point and of the evidence relating thereto. There is nothing there which says that, if the judge shall be right in his conclusion, the Court are to reverse his judgment, and decide the case wrongly because on the point submitted to us he happens to have made a mistake. It would be extravagant to suppose that we ought to do so. The parties might be agreed on the facts, and the judge may have given half-a-dozen right reasons, and yet, because he may also give one wrong one, the decision would have to be reversed. I think that would be idle.

I next turn to the two points in the case. The first is this: The execution debtor was in possession of the goods assigned by an unregistered bill of sale which is admitted to be void as against the execution creditor. There is a subsequent settlement by the grantee, that is admitted to be void, because unregistered. Then there being a third document, which I will for the present suppose to have been executed by the trustee Higgs, it is said that as this was registered it takes effect so as to vest the goods in Watson, and therefore the execution creditor is defeated. That would, I think, be altogether contrary to the intention of the Bills of Sale Act. It is not specifically provided in the Act that the registration shall be the registration of a document proceeding from the person in possession, or apparent possession, of the goods. But on the other hand there is nothing against this in the Act. Every section seems to contemplate that a bill of sale, to be good against an execution creditor, must be a document executed by a person who has not parted with the goods, but remains in possession. The object of the Act appears to be to prevent a transaction which

is so often fraudulent, viz., goods being conveyed to one person as security while they remain in possession of another who obtains credit on them, or misleads execution creditors into levying, and gets the costs of the proceedings taken against goods the property in which is transferred. Where there is a transfer of possession the Bills of Sale Act is not required at all. Section 8 virtually enacts that every bill of sale as against trustees in bankruptcy, sheriff's officers, and others, seizing in execution any chattels comprised in the bill of sale, and "also as against every person on whose behalf such process shall have been issued shall be deemed fraudulent and void." To what extent? Not absolutely, but "so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time" of executing such process (as the case may be), and after the expiration of the seven days for registration, "are in the possession, or apparent possession, of the person making such bill of sale." The main, and indeed almost the whole object is that it shall be known to debtors and others of the public who purchase chattels, that although they are in the apparent possession of A., yet, that by going to the proper office, one can find out that the real owner is B. Other sections shew the same thing: for example, s. 20, which enacts that "chattels comprised in a bill of sale, which has been and continues to be duly registered under this Act, shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale" within the meaning of the Act. So likewise the final clause, s. 10, sub-s. 3, enacting that "a transfer or assignment of a registered bill of sale need not be registered." And again, the provisions of s. 10 require, with great accuracy, the name and description of the residence and occupation of the grantor to be stated, and the Courts have been extremely stringent in enforcing compliance with all those requirements. Why? That there may be no fraud, and that it shall be accurately pointed out on the register, not merely who has got the goods, but that the grantee is not in possession. I find nothing in the Act leading to such a consequence as the argument for the claimant involves. I should hesitate before admitting such consequence, and would rather leave it to the Court of Appeal to consider. A case has been cited which

1880

CHAPMAN v. KNIGHT.

Grove, J.

seemed in favour of the appellant, but there is in it a very material difference—perhaps not conclusive—in favour of the view I take. In *Edwards* v. *English* (1) not only was the claimant taking advantage of his own wrong, but there was this distinction, viz., that the second bill of sale was not a bill of sale by the transferee of the property, but by the person actually in possession. Notwithstanding the fact that the person had got rid of the property in the goods, it was held that the same person could give a sufficient bill of sale effective to confer a good title as against the execution creditor. That is in favour of my view that the main object of the Bills of Sale Act is that the person who remains in possession of the goods shall be the party whose name is on the register, and in *Edwards* v. *English* (1) it was held that although he had parted with the property in the goods, he could give another effective security against execution creditors. But there is another case, *Richards* v. *James* (2), which goes a little further. There two bills of sale, the first unregistered, the second registered, were both granted by the same party, and the Court held that the person taking under the second bill of sale took as against the execution creditors.

Now in this case if the claimant is right, although Oliver could not set up the unregistered bill of sale, he could do it practically in a moment by nominally assigning to somebody else, and then that person registering the bill of sale, so the very object not only of the statute, but the ratio decidendi of that case would be defeated. Lush, J., delivering the considered judgment of the Court says, "What then is the consequence of avoiding a bill of sale by an execution? Is it to displace the security altogether, or is it only to neutralize it so far as it affects the interest of the execution creditors, and to leave it operative as to all other interests? We are of opinion that the consequence is to displace it altogether, and that in no other way can due effect be given to the statute." (3)

That seems to me an authority tending to support the conclusion of the learned county court judge, which I think is right. On the second point my Brother Lopes concurs with me, and we

(1) 7 E. & B. 564. (2) Law Rep. 2 Q. B. 285.
(3) Law Rep. 2 Q. B. 285, at p. 291.

both think that there was not a proper assignment within the Bills of Sale Act. I have already read some of the provisions which apply to the first point and also to the second, particularly the provisions of s. 10, as to execution and attestation, and the names of the grantor and grantee, and the index of them to be kept under s. 12.

If the second assignment by the cestui que trust were good the whole of that part of the Act would be defeated, for a person would only have to create a secret trust and the cestui que trust without any legal title executing the bill of sale his name would appear as grantor and there would be no trace of the existence of the legal owner, and so fraud might be committed. Now the settlement gave no power to the wife to sell, but to Higgs to sell at her direction. She herself sells without any power given by deed or legal interest in the goods, and her name only appears on the register. It may be that she has a good equitable interest and that the Courts of Equity would compel Higgs to follow her direction, but that is not the question. The question is, whose name should appear in the register of the bill of sale? I think the name of Higgs and not that of Emily Knight. So the Bills of Sale Act has not been complied with and the bill of sale not properly registered, therefore even supposing the county court judge were wrong, we are of opinion that there was no proper registration here and therefore it is void, a result which cannot be altered by any new trial, and that the judgment is right even if the first point should fail. If either point were decided the other way it would virtually repeal the Act.

Were the balance of equities considered it would be against a man who takes goods knowing nothing about them. I think the judgment should be affirmed.

LOPES, J. I also think the judgment should be affirmed. I quite agree with everything said by my Brother Grove on the second point and in the reasons so elaborately given on which we have arrived at that conclusion. But with respect to the first point I differ with great hesitation from the view taken by my learned Brother. I am not prepared to go the length of holding that a prior bill of sale, void against an execution creditor because not

1880

CHAPMAN v. KNIGHT.

Lopes, J.

registered, can have the effect of rendering inoperative, as against the execution creditor, a subsequent bill of sale given by the holder of the unregistered bill of sale and properly registered. This is however immaterial for the decision of this case, which can be decided on the other point. I think the judgment should be affirmed on the second point.

Rule discharged.

Solicitor for plaintiff: *W. T. Boydell.*
Solicitor for claimant: *Poncione.*

May 14.

LAZARUS *v.* ANDRADE.

Bill of Sale—Assignment of Future-acquired Property—Stock-in-Trade, Substitution of.

By bill of sale the grantor assigned to the grantee the stock-in-trade then in certain specified premises, and also the stock-in-trade which should or might at any time during the continuance of the security be brought into the premises, either in addition to or in substitution for stock-in-trade therein at the date of the bill of sale:—

Held, by Lopes, J., that the assignment was sufficient to pass the property in stock-in-trade afterwards brought into the premises in addition to or in substitution for that previously there.

FURTHER CONSIDERATION.

An interpleader issue tried before Lopes, J., raised the question whether goods seized in execution of a judgment against one Phillips were the property of the plaintiff, or of the defendant, the execution creditor. The plaintiff claimed under and proved a bill of sale by which Phillips, for the consideration therein mentioned, had assigned to the plaintiff "all and singular the stock-in-trade, chattels, goods, and effects now being in, upon, or about the messuage or dwelling-house, warehouse, and premises situate and being No. 62, Wilson Street, Finsbury, in the county of Middlesex, the particulars whereof are set forth in the schedule hereunder written. And also the stock-in-trade, goods, chattels, and effects which shall or may at any time or times during the continuance of this security be brought into the aforesaid messuage or dwelling-house, warehouse, and premises, or be appropriated to the use

thereof, either in addition to or in substitution for stock-in-trade, goods, chattels, and effects now being therein, or any of them." The schedule, specifying the contents of a warehouse, set out various quantities of ostrich and other feathers, and some business furniture. Some stock-in-trade afterwards brought on to the premises in addition to or substitution for that which was there at the date of the bill of sale was seized as aforesaid.

Crispe, and *Hart*, for the plaintiff. The bill of sale, being an absolute assignment of future-acquired goods thereafter to be brought on to the messuage mentioned, passes the property in them: *Holroyd* v. *Marshall* (1), and is not a mere licence to seize, as in *Reeve* v. *Whitmore*. (2)

Bullen, for the defendant. The doctrine of *Holroyd* v. *Marshall* (1) only applies to subsequently acquired property when so specifically described as to be identified: Benjamin on Sale, 2nd ed. p. 65, citing *Belding* v. *Reed* (3), where a bill of sale purported to convey all the bankrupt's property being or hereafter to be upon or about his dwelling-house, farm, and premises situate at Reedham or elsewhere in the kingdom of Great Britain, and Pollock, C.B., said, "the defendant could not lawfully seize property which the bankrupt acquired after the bill of sale was executed; and in this view I see nothing inconsistent with the principle laid down in *Holroyd* v. *Marshall*." (1) Nothing has ear-marked or identified the future-acquired property. In *Leatham* v. *Amor* (4) additional machinery, which had been brought on to the premises after the date of the bill of sale comprising future property, was annexed to the machinery there when the bill of sale was given, and the Court thought it had "become specific."

Crispe replied.

Cur. adv. vult.

May 14. LOPES, J. This bill of sale purported to assign to the plaintiff all the stock-in-trade, chattels, goods, and effects in the messuage, particulars whereof were set forth in a schedule there under written. And also the stock-in-trade, goods, chattels, and

(1) 10 H. L. C. 191. (3) 3 H. & C. 955.
(2) 33 L. J. (Ch.) 68. (4) 47 L. J. (Q.B.) 581.

1880

LAZARUS v. ANDRADE.

effects, which should or might at any time or times during the continuance of the security be brought into the messuage, warehouse, and premises, or be appropriated to the use thereof, either in addition to or in substitution for stock-in-trade, chattels, and effects now being therein, or any of them.

The sheriff had seized stock-in-trade not being contained in the said schedule, nor in the premises when the bill of sale was executed, but other stock-in-trade not comprised in the schedule which had been brought into the premises by the grantor subsequently to the date of the bill of sale. Such last-mentioned property had been brought into the premises in addition to or in substitution for stock-in-trade in the premises when the bill of sale was executed.

It was contended for the defendant (the execution creditor) that the goods brought into the premises subsequently to the execution of the bill of sale did not pass to the plaintiff, and that the title of the defendant in respect of them was preferable to the title of the plaintiff (the claimant). *Holroyd* v. *Marshall* (1) and *Leatham* v. *Amor* (2) were relied on by the plaintiff, and *Belding* v. *Reed* (3) by the defendant. The principle deducible from these decisions is that property to be after acquired, if described so as to be capable of being identified, may be, not only in equity but also at law, the subject-matter of a valid assignment for value. The contract must be one which a Court of Equity would specifically enforce. *Belding* v. *Reed* (3) was decided before the Judicature Acts, and is distinguishable from the present case. The ground of that decision was, that the description "all other the personal estate and effects whatsoever now being or hereafter to be on the premises or elsewhere in the United Kingdom," was so vague that it did not entitle the claimant to institute a suit for specific performance of the contract. Neither the character of the property nor its whereabouts was indicated, and there was nothing to ear-mark it. In this case the property is to be brought into the premises or to be appropriated to the use thereof, either in addition to or in substitution for property then on the premises. I think the assignment sufficiently specific, the property in question having become specific by being brought on to

(1) 10 H. L. C. 193. (2) 47 L. J. (Q.B.) 581.
(3) 3 H. & C. 955.

1880

LAZARUS v. ANDRADE.

the premises in addition to or in substitution for property mentioned in the schedule. The case of *Leatham* v. *Amor* (1) is a strong authority in favour of this view.

Judgment for the plaintiff.

Solicitors for plaintiff: *Noon & Clarke.*
Solicitors for defendant: *Stallard & Whitting.*

ELPHICK *v.* BARNES.

March 13.

Sale of Goods—Goods sold and delivered—Conditional Sale of a Horse—Death of the Horse before the Sale became absolute.

A horse was sold by the plaintiff to the defendant upon condition that it should be taken away by the defendant and tried by him for eight days, and returned at the end of eight days if the defendant did not think it suitable for his purposes. The horse died on the third day after it was placed in the defendant's stable, without fault of either party:—

Held, by Denman, J., that the plaintiff could not maintain an action for the price, as for goods sold and delivered.

STATEMENT OF CLAIM. 1. The plaintiff is a cattle-dealer residing at Brighton; and the defendant is a dairyman also residing at Brighton.

2. On the 31st of July, 1879, the plaintiff sold and delivered to the defendant, and the defendant bought and received from him, a horse and cow at the price of 65*l.*, which sum the defendant has neglected and refuses to pay.

Statement of defence. 1. The defendant admits that he agreed to purchase of the plaintiff a horse and cow.

2. The said animals were not sold or purchased together at the price of 65*l.*, but were purchased under two separate and distinct contracts. The price of the horse was 40*l.*, and the plaintiff warranted it sound and well, and it was sold to the defendant on the terms that if it did not answer to the said warranty, or suit the defendant, the defendant should be at liberty to reject the same. The horse was neither sound nor well at the time of the sale to the defendant, but was suffering from internal inflammation, and in consequence of such unsoundness and illness it died

(1) 47 L. J. (Q.B.) 581.

1880

ELPHICK v. BARNES.

before a reasonable time in which to return the same to the plaintiff had elapsed. The defendant on discovery of the said unsoundness repudiated the contract and gave notice thereof to the plaintiff.

3. The cow was sold to the defendant for 25*l.* The defendant was always ready and willing to pay the 25*l.* to the plaintiff, and before action tendered and offered to the plaintiff to pay him the same, but the plaintiff refused to accept it; and the defendant brought 25*l.* into court, &c.

4. By way of counter-claim the defendant claims from the plaintiff damages for the breach of the above-mentioned warranty of the horse, whereby the same died and became and was worthless to the defendant and the defendant lost the value of the horse and the price, and the profit he would have made from the sale of the same, &c.

Reply. 1. Joinder of issue upon the statement of defence.

2. As to the counter-claim, the plaintiff denies that he gave any such warranty as alleged, and further states that the horse mentioned in the pleadings was sound and well at the time of the sale thereof to the defendant. Issue.

The cause was tried before Denman, J., at the last Spring Assizes for Sussex, and was afterwards argued before him, upon further consideration, by *Grantham, Q.C.*, and *Houghton*, for the plaintiff, and by *Day, Q.C.*, and *Gore*, for the defendant. The learned judge took time to consider.

The facts and arguments are fully set out in the judgment, which was as follows:—

March 13. DENMAN, J. The plaintiff in this case sued the defendant for 65*l.*, the price of a horse and a cow sold and delivered.

The defendant admitted that he agreed to purchase a horse and a cow, but alleged that they were not sold or purchased together at 65*l.*, but under two separate and distinct contracts. There was conflicting evidence as to this part of the defence: but, upon the argument before me (there having been no finding of the jury upon the point), it was agreed that I should decide the question; and I found for the defendant, that there were two

separate and distinct contracts, the horse being to be sold for 40*l.*, and the cow for 25*l.* The latter amount was paid into court; and no question remains for decision except that arising upon the defendant's answer to the plaintiff's demand so far as the price of the horse was concerned. This answer as set out in the statement of defence was as follows:—"The price of the said horse was 40*l.*, and the plaintiff warranted it sound and well, and it was sold to the defendant on the terms that, if it did not answer the said warranty *or suit the defendant*, the defendant should be at liberty to reject the same. The said horse was neither sound nor well at the time of the sale to the defendant, but was suffering from internal inflammation, and in consequence of such unsoundness and illness, *it died* before a reasonable time in which to return the same had elapsed. The defendant, on discovery of the unsoundness, repudiated the contract, and gave notice thereof to the plaintiff."

The jury found that there was no warranty of soundness, and that the horse was in fact sound at the time when the bargain was made. But the defendant's counsel at the trial relied not only on a warranty, but upon evidence that the plaintiff, at the time of the bargain being made, had agreed that the defendant might take the horse away and work him, and, if he did not suit the defendant by working in every kind of vehicle for which the defendant required him, the defendant might return him within eight days, and that, *if the horse was satisfactory*, the defendant should pay for him at that time, viz. at the end of the eight days. The bargain having taken place on Thursday, the 31st of July, the horse died on Sunday, the 3rd of August, in the defendant's stable, to which he had been removed on the 31st of July. Under these circumstances, the defendant's counsel contended that the defendant was not liable, because the bargain was a conditional one, and, the sale not having become absolute before the death of the horse, an action for goods sold and delivered would not lie.

It was objected, for the plaintiff, that no such case ought to be left to the jury, because it was not raised by the statement of defence. But I was of opinion that this defence was one included in the statement of defence; that the pleadings might properly be amended if necessary, but that it was not necessary to amend

1880

ELPHICK v. BARNES.

them; and that no injustice would be done by leaving the question to the jury. I therefore left it to the jury as follows:— "Was the bargain on the 31st of July one for a sale out and out, or only for a sale conditional on the defendant finding the horse all right at the end of the eight days?" The jury found, in answer to that question, "that the bargain was conditional on the horse being *right* and with a trial for eight days." Being doubtful what the jury meant by "right," I asked them the question; to which they replied, "suitable for the defendant's purposes, not contemplating the case of death." They afterwards added, in answer to a further question, "But for the complaint which came on after the bargain, we see no reason to suppose that the horse would not have been suitable for the defendant's purposes; by *trial*, we mean a trial as regards suitability, not as regards health." Taking all these findings together, I think they amount to a finding that the plaintiff sold the horse to the defendant upon a condition that the horse should be taken away by the defendant and tried by him for eight days, and returned at the end of eight days if the defendant did not think it suitable for his purposes.

The horse having died without fault of either party, the question is, whether the plaintiff can maintain his action for goods sold and delivered. I am of opinion that he cannot.

The case of *Ellis* v. *Mortimer* (1) shews that the defendant had the whole time allowed for the trial in which to decide whether he would return the horse or not. I think it clear that no action for goods sold and delivered would have lain at any time before the eight days had expired, in case the horse had lived. But before the eight days had expired the horse died. If the defendant were to be fixed with the price of the horse, he would be compelled to pay for something different from what he had bargained for, viz. a horse of which he should have had eight days' trial. The finding that the horse might or probably would have suited the defendant's purposes does not appear to me to be sufficient reason for fixing the defendant as the absolute owner of the horse. The option was his at the moment of the horse's death, and down to a later period if the horse had lived.

The case of *Rugg* v. *Minett* (2), which was relied upon for the

(1) 1 N. R. 257. (2) 11 East, 210.

plaintiff, does not appear to me to apply, because that was not a case in which the buyer of the goods which were destroyed had any option as to whether he should become the purchaser or not, but, at the time of the destruction of the goods, he had by virtue of the bargain and of what had passed become the absolute owner of the goods in respect of which he was held liable. Nor, in my opinion, does the dictum of Coleridge, J., in *Moss* v. *Sweet* (1), which was relied upon for the plaintiff, help the plaintiff's contention in this case. That was a case in which, the defendant having taken delivery of goods "on sale or return," and having kept the goods, it was held that the sale was complete if the goods had not been returned within a reasonable time, and that the common count for goods sold and delivered would suffice. Coleridge, J., in that case says: "The goods in question passed on condition that, unless returned, that is, at the option of the buyer, within a reasonable time, they were to be taken as sold to him. That condition was at an end after the lapse of a reasonable time without a return of the goods; and the sale was then complete." He does not say that it was complete *before* that time. He does go on to say,—"The same consequence would follow where goods are destroyed or injured, so that a return within the meaning of the contract becomes impossible." This was relied upon as referring to an accidental destruction, such as by death or fire. I think it clear that this was not the meaning, but that the learned judge referred to destruction of or injury to the goods being the act of the defendant, in which case of course the defendant would have been liable as much as if he had kept them an unreasonable time.

The case of *Head* v. *Tattersall* (2) is nearer to the present case. That was an action for money received, to recover back the price of a horse which had been sold at Tattersall's with a warranty and a condition that the plaintiff was to be at liberty to return the horse, if it did not answer the description, up to the following Wednesday. The horse was injured on its way home, and depreciated in value, but without any fault of the plaintiff's servant, who was taking it home. The horse, being found not to correspond with the warranty, was returned within the time: and it

(1) 16 Q. B. 495. (2) Law Rep. 7 Ex. 7.

1880

ELPHICK v. BARNES.

was held that the plaintiff had a right to return it and recover back the price, notwithstanding that he was unable to return it in the same condition. It was attempted to distinguish that case from the present, on the ground that there was a right to return the horse on a specific ground, on which it was in fact returned. But I can see no difference in principle between such a case and the case in which the purchaser has an option to return the horse on any ground still remaining to him at the time at which the event occurs which renders it impossible for him to exercise that option, and so to have the whole benefit of his bargain. In such a case, I think the sale to him cannot be considered to be absolute at the time of the accident occurring. The maxim of ne perit domino applies, I think, in such a case much more reasonably as against the unpaid contingent vendor than as against the possible vendee still having an option to return at the end of a period not yet expired. I think the law relating to such a case is accurately stated by Mr. Benjamin in p. 483 of the 2nd edition of his work on Sales, where he lays it down as follows, speaking of "sales on trial," or "sales on approval," in which cases, he says, "There is no sale until the approval is given either expressly or by implication, resulting from keeping the goods beyond the time allowed for trial." Here, I think, there was no sale at the time of the horse's death, which happened without the fault of either party, and therefore that the action for goods sold and delivered must fail: and I give judgment for the defendant, except so far as relates to the costs of and occasioned by the allegations of warranty and unsoundness, which costs I order to be paid by the defendant,—such costs to be set off against the defendant's costs, on taxation.

Judgment for the defendant.

Solicitor for plaintiff: *Thomas A. Goodman, Brighton.*
Solicitors for defendant: *Lamb & Evett, Brighton.*

HAMLYN *v.* BETTELEY.

1880
March 17.

Bill of Sale—Statement of Consideration—Bills of Sale Act, 1878 (41 & 42 *Vict.* c. 31), *s.* 8.

The consideration for a bill of sale was stated to be "the sum of 182*l.* 3*s.* now paid by the grantee to the grantor." That sum was, at the request and with the assent of the grantor, in fact paid thus,—8*l.* 3*s.* 3*d.* and 103*l.* 17*s.* 5*d.* to discharge two executions against the grantor's goods,—25*l.* 0*s.* 9*d.* to a solicitor (who attested the execution of the bill of sale) for money lent and for costs due to him from the grantor,—and the balance, 45*l.* 1*s.* 7*d.*, in cash to the grantor:—

Held, in the absence of any suggestion of fraud, a sufficient setting forth of the consideration, within 41 & 42 Vict. c. 31, s. 8.

THIS was an interpleader issue to try whether certain stock-in-trade, furniture, and effects seized by the sheriff of Essex, under an execution at the suit of the defendant, were at the time of such seizure the property of the plaintiff as against the defendant.

At the trial before Denman, J., at the last Chelmsford assizes, the facts proved were as follows:—The goods seized had been assigned to the plaintiff by T. W. Warner, the judgment-debtor, under a bill of sale made on the 23rd of October, 1879, between Warner (therein called the mortgagor) of the one part, and the plaintiff (therein called the mortgagee) of the other part. It recited that "the said mortgagor, having two executions upon his premises situate in High Street, Great Dunmow, and being unable to carry on his business by reason thereof, had applied to and requested the said mortgagee to advance and lend him the sum of 182*l.* 3*s.* to enable him to pay out such executions and to carry on his said business, which the said mortgagee had agreed to do on having the assignment or other assurance thereinafter contained." The deed then witnessed that, in pursuance of the said agreement, and in consideration of the said sum of 182*l.* 3*s.* then paid, the property in question was assigned in the usual way to the mortgagee. A receipt was indorsed whereby Warner acknowledged that he had received "the sum of 182*l.* 3*s.*, being the consideration money within expressed."

It was proved at the trial that the 182*l.* 3*s.* was paid by the plaintiff in the following manner:—to Jeffery, a sheriff's officer, a cheque for 8*l.* 3*s.* 3*d.* to pay out an execution against Warner's

Scrutton. 66 B.D. 63.

1880

HAMLYN v. BETTELEY.

goods,—to a Miss Oman, who had been an execution creditor, a cheque for 103*l.* 17*s.* 5*d.*, in discharge of her claim,—a cheque for 25*l.* 0*s.* 9*d.* to Mr. John Evans (by whom the bill of sale was attested) for his claim against Warner for money lent and for costs as his solicitor,—and a cheque for 45*l.* 1*s.* 7*d.*, the balance of the 182*l.* 3*s.*, to Warner. These payments were all made at the request or with the assent of Warner; and the several cheques were duly honoured.

The learned judge was of opinion that the statement of the consideration was not a due compliance with s. 8 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), which enacts that "every bill of sale to which this Act applies shall be duly attested, and shall be registered under this Act within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale shall be deemed fraudulent and void" as against the persons therein mentioned, amongst others, execution creditors: and he directed the jury to find for the defendant, which they accordingly did.

Feb. 20. *Edward Pollock* obtained a rule nisi for a new trial on the ground of misdirection.

J. G. Witt, shewed cause. The object of the 8th section of the recent statute was to compel parties to bills of sale to disclose the true nature of the transaction,—to protect execution creditors against fraud, and to prevent the borrower from obtaining a fictitious credit.

[GROVE, J. The "consideration" must be truly set forth. What the borrower means to do with the money has nothing to do with the consideration moving from the lender to the borrower The question is what was the money or other thing advanced by the grantee upon the security of the goods.

DENMAN, J. Part of the money was paid to Evans, the attesting solicitor. That fact operated upon my mind at the trial.]

The deed recites that the money is "now paid." It is at least inaccurate and misleading.

Edward Pollock, in support of the rule. There is no suggestion of fraud here. It was perfectly immaterial to the grantee of the bill of sale whether the consideration money was paid to the

1880

HAMLYN v. BETTELEY.

grantor or to some one else on his behalf, so long as he himself parted with the whole of the agreed sum. The money was as much lent to the grantor as if the whole of it had been paid into his own hands. In Leake on Contracts, ed. 1878, p. 611, it is said,—"The matter of the consideration required to support a promise is defined as consisting of 'any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however small the detriment or inconvenience may be, if such act is performed or inconvenience suffered by the plaintiff with the consent express or implied of the defendant, or, in the language of pleading, at the special instance and request of the defendant:'" per Tindal, C.J., in *Laythoarp* v. *Bryant*. (1) In *Hutton* v. *Cruttwell* (2), Mrs. Yandall, a trader, being indebted to one Landsdell in 227*l*., executed a bond and warrant of attorney, upon which Landsdell entered up judgment: subsequently, the defendant, who was Landsdell's attorney, agreed to pay 200*l*. to Landsdell (which Landsdell agreed to accept in liquidation of the whole 227*l*.), on the understanding that Mrs. Yandall should execute a bill of sale of her effects to the defendant to secure the repayment to him of the 200*l*., which she accordingly did: and it was held that this was a good consideration for the deed as against creditors. Lord Campbell, in delivering judgment, says (3): "We think it (the deed) cannot be impeached by the circumstance of the money being paid directly by the defendant to Landsdell, the creditor of Mrs. Yandall; for it was, in truth, an advance to her to enable her to satisfy a pressing demand; and the defendant was her agent in making the payment, in the same manner as if the money had remained some time in her actual possession."

[GROVE, J. If the real consideration is disclosed, it is not necessary to set forth all the circumstances surrounding the transaction.]

Paying out the executions may have enabled the grantor to carry on his business. All the money was actually advanced on the day of the execution of the bill of sale.

(1) 3 Scott, 238, at p. 250. (2) 1 E. & B. 15; 22 L. J. (Q.B.) 78. 17 Jur. 392.
(3) 1 E. & B. at p. 20. 17 Jur. 393.

1880

HAMLYN v. BETTELEY.

DENMAN, J. I am inclined to think I was a little too hasty in ruling at the trial that the consideration for this bill of sale was not truly set forth. If there had been a wilful misdescription of the transaction, I do not say that this would have been a true setting forth of the consideration. But I think the evidence did not disclose anything of that sort. The sum stated, 182*l.* 3*s.*, was truly advanced: and the mere fact that Evans, who acted as the grantor's solicitor, received part of the money in discharge of a debt due to him does not vitiate the transaction.

GROVE, J. The real consideration for the giving of the bill of sale was 182*l.* 3*s.*, which passed from the grantee to the grantor. That might have enabled the latter to carry on his business. There was no evidence that the other statements in the bill of sale were untrue. The fact that part of the money went to other persons, with the grantor's assent, does not render the statement of the consideration inaccurate: it was quite competent to him to direct what should be paid to himself and what should be paid to others on his behalf. If the mis-statement of the transaction is so mixed up with the consideration as to give an untrue impression of what the consideration really was, that might be an improper setting forth of the consideration: but that would be a very different case from this.

Rule absolute.

Solicitor for plaintiff: *John Evans.*
Solicitors for defendant: *S. Betteley & Co.*

CHAPLEO AND WIFE *v.* BRUNSWICK BENEFIT BUILDING SOCIETY AND OTHERS. 1880 *April* 24.

Building Society—Unincorporated—Certified Rules—Borrowing in excess of prescribed Limit — Agent—Authority — "Holding out" by Society and Directors—Liability.

By the certified rules of an unincorporated building society the directors might borrow money not exceeding a prescribed amount. Loans were made to the society through its secretary who was also acting treasurer; the usual course of business was that he delivered to the lenders a receipt and undertaking on behalf of the directors to give promissory notes signed by the directors, and subsequently exchanged such notes for the receipt and undertaking. After a total amount had been borrowed exceeding that limited by the rules, the plaintiffs paid a sum to the secretary as a loan to the society, and received from him the usual receipt and undertaking, but no promissory notes. This sum he appropriated to his own use. In an action against the society and directors the jury found that the society held out the secretary to the plaintiffs as having authority to receive the loan on their behalf on the terms on which it was received, and that the directors did the same:—

Held, by Lord Coleridge, C.J., that although money had been borrowed in excess of the total amount limited by the rules, and they might therefore afford protection to the society or its members as between themselves and the directors, yet that the society and directors having for a purpose legal in itself authorized the loan made by the plaintiffs were both liable to them.

Varied by C.A. Aff'd 6 QBD. 696

FURTHER CONSIDERATION.

The proceedings, facts, and arguments are sufficiently stated in the judgment.

C. Russell, Q.C., Taylor, and *C. A. Russell*, for the plaintiffs.
Heywood (*Herschell, Q.C.*, with him), for the defendant society.
Pope, Q.C., and *Crompton*, for the defendant directors.

April 24. LORD COLERIDGE, C.J. This case was tried before me and a special jury at Manchester in February last; certain points arising on the findings of the jury were argued before me at Westminster on the 13th and 20th of March, and I now proceed to give judgment.

The action was brought against the Brunswick Building Society, and the directors of the society, to recover a considerable sum of money lent by the plaintiffs to the society under circumstances which I will presently detail. The whole of the sum in dispute

1880

CHAPLEO v. BRUNSWICK BENEFIT BUILDING SOCIETY.

with interest has been paid by the defendants except a sum of 100*l.* But, as the defence to this sum of 100*l.* is one upon the validity or invalidity of which the liability to pay many thousands of pounds depends, it is thought worth while, and no doubt is worth while, to resist payment of it. The defendant society was established in January, 1871. Its rules were certified pursuant to the Act then in force, in March, 1871; and certain amendments to the rules were certified in March, 1873. Its object is defined by the first rule which is as follows:

"1. This society shall be denominated the 'Brunswick Permanent Benefit Building Society.' Its object is to enable its members to receive the amount or value of a share or shares to purchase or erect freehold or leasehold property. Payments to be made fortnightly in such sums as are hereinafter specified and defined; each share to be of the value of 10*l.* Members may subscribe for any number of shares."

The 6th rule prescribes that the directors shall at any meeting elect a treasurer from amongst themselves and the other members at such remuneration as may be deemed proper.

The 10th rule is this: "Messrs. Keighley Lea, Son, & Co. shall be the secretaries to the society."

The 12th rule, upon which much of the argument before me turned, is as follows:

"The directors may at any time as may be necessary for the purposes of the society borrow money at interest from any banker with whom the funds of the society shall be deposited, or from any other source, to procure which the directors may give such security as they may think proper, but the total amount of money to be so borrowed shall not at any one time exceed two-thirds of the amount for the time being secured by the mortgages to the society."

It is admitted that when the 100*l.* in dispute in this action was paid by the plaintiffs, the total amount of money borrowed by the society exceeded (in fact it very largely exceeded) the amount secured by mortgage within the terms of this 12th rule. The question is whether the society and the directors of the society are nevertheless liable to repay it under the circumstances which I now proceed to state.

The money was not paid to the society itself assembled at a general meeting, nor even to one or more of the directors at any board meeting. It was paid to a Mr. Keighley Lea, and his connection with the society and with the directors was this. His firm were made secretaries by the 10th rule. They kept all the business and cash books belonging to the society. One of them attended the meetings of the directors, and kept the minutes. Mr. George Lea had been treasurer, and after his death Keighley Lea acted as treasurer, and received all the money paid to the society, and if he was not treasurer there was none. A question was made as to the exact meaning of certain minutes referring to the appointment of treasurer, a question which, after the statement of fact just made, and made in the uncontradicted words of one of the witnesses, I do not think it material to discuss. The office of Keighley Lea was the only office of the defendant society; there only the society met whenever it did meet; there only the meetings (generally once a fortnight) of the directors were held. Keighley Lea was, as one of the directors who was a witness at the trial called him, "the factotum of the society." The society borrowed money largely; and the mode in which the borrowing was conducted was, without any exception, from the very beginning of the society, the mode pursued in this case. The lender brought the money to Keighley Lea; a receipt and an undertaking on behalf of the directors to give a promissory note of the directors was given him in the form used in this case on behalf of the society and the directors either by Keighley Lea or by one of his clerks; promissory notes for the amount of the sum lent were then signed by the directors at their next meeting, and exchanged for the receipt and undertaking through Keighley Lea; and on the sums so borrowed and so secured interest was paid. Except as to the 100*l.* now in dispute, this course was followed with respect to the plaintiffs; all the sums lent to the society were secured by the promissory notes of the directors, and these notes have been paid. In the case of this 100*l.* the money was received, and the receipt and undertaking was given, but no promissory note was ever procured. The money was paid to Keighley Lea on the 29th of October, 1878; and in December, 1878, or in January, 1879, Keighley Lea absconded, a large

1880

CHAPLEO v. BRUNSWICK BENEFIT BUILDING SOCIETY.

sum of money belonging to the society, and paid to him, having never been paid over to them by him. On application to the directors by the plaintiffs they refused either to pay interest on the 100*l.*, or to give their promissory note for it; they repudiated all liability for themselves or for the society; and the question is are either or both liable?

At the trial the evidence was substantially all one way, and I left two questions to the jury. 1. Did the defendant society hold out Keighley Lea to the plaintiffs as having authority to receive this loan on their behalf on the terms on which it was received? 2. Did the defendant directors?

The jury answered both questions in the affirmative, and if they could so find in point of law I am of opinion that there was abundant evidence to warrant them so finding in point of fact. It is said, however, that they could not, and this has now to be considered.

The case is not quite the same as it affects the society and as it affects the directors, and I will deal with the liability of each separately, and first as to the society itself.

It is true that though it has been incorporated under the provisions of 37 & 38 Vict. c. 42, it had not been so incorporated and was not a corporation at the time of the lending of this 100*l.* But the society as a body, just as any other co-partnership as a body, might know, and so act upon their knowledge as to sanction the proceedings of Keighley Lea. Of this knowledge, and of their so acting upon it, there has been abundant evidence given against the society. If it was not so in point of fact it might have been denied. If the members of the society or any of them were really ignorant of what Keighley Lea was habitually doing, and if knowing it they did not sanction it, they might have been called to say so. No one was called to say so, probably for the best reason, that no one could be. The case comes, therefore, under a well-settled principle. The society have put their agent in his place to do the very acts for them which he did, and they must be answerable for the manner in which he has conducted himself in doing those acts. If authority be necessary for this proposition, it is to be found in *Barwick* v. *English Joint Stock Bank* (1) and *Mackay* v. *Commercial Bank of New Brunswick.* (2)

(1) Law Rep. 2 Ex. 259. (2) Law Rep. 5 P. C. 394.

The dicta of Lord Cranworth and Lord Chelmsford in the case of *Western Bank of Scotland* v. *Addie* (1), which have been supposed to conflict with these cases are clearly explained and reconciled by Sir Montague Smith at p. 413 of the report of that case in the Privy Council.

It has been argued that in order to ascertain whether the society have put their agent in his place to do for them the acts he did, the constitution of the society itself must be borne in mind. I make no doubt at all that this is true, and if it should turn out that the society could not authorize an agent to do the act, because it was an act they could not do themselves, they would not be liable for what he did. The argument addressed to me on this point was as follows: This is a society which exists only for certain purposes; it does not exist for the purpose of borrowing beyond the limit ascertained by the 12th rule; it could not itself borrow; it could not ratify the acts of its directors in so borrowing; any such borrowing therefore by an agent, as there was in this case, cannot be authorized in point of fact, because there is no power to authorize it in point of law, and the judgment of the House of Lords in *Riche* v. *Ashbury Railway Carriage and Iron Co.* (2) was cited as establishing conclusively the proposition contended for. I think it establishes nothing of the kind. The company in that case was an incorporated company, with a memorandum and articles of association. The contract on which the action against the company was brought was a contract which in the opinion of all the judges (they differed upon other points, but agreed on this) was inconsistent with the memorandum of association; and on this ground the House of Lords decided the case. But in the case before us there is no memorandum and no articles of association, and if it be said, as with some reason it may be, that the first rule is analogous to the memorandum, and the remaining rules to the articles, then there is the authority of *Laing* v. *Reed* (3) to shew that the existence in such a society as this of such a rule as Rule 12, is neither illegal in itself, nor inconsistent with a rule exactly like Rule 1 in the present case. I

(1) Law Rep. 1 H. L., Sc. 145. (2) Law Rep. 7 H. L. 653.
(3) Law Rep. 5 Ch. App. 4.

1880

CHAPLEO v. BRUNSWICK BENEFIT BUILDING SOCIETY.

may observe in passing that the authority of *Laing* v. *Reed* (1) is expressly recognised and in no way diminished by the later case of *In re National Permanent Benefit Building Society, Ex parte Williamson.* (2) These cases it is true establish only that such a society as this may borrow; they do not ascertain that if it borrows beyond the limit prescribed by the rules it may nevertheless be liable. But both were cases in which the point did not and could not arise: for they were cases in which the plaintiffs were themselves members of the company; and it may well be as between members of the company and the directors, such a rule as Rule 12 may in certain circumstances protect the company or certain members of it. But this case is not like those, Rule 12 applies in terms to the directors only. In this case the society, for a purpose in itself legal, have authorized Keighley Lea to take the 100*l.* for them from the plaintiffs. I am of opinion they are liable to repay it.

So much as to the society. As to the directors it seems to me quite plain that they might if they pleased hold out Keighley Lea to the plaintiffs as authorized to undertake for them that they would give their promissory note on the receipt of money paid as this 100*l.* was paid. It seems to me equally plain that there is overwhelming evidence, quite uncontradicted, that they did in fact so hold him out. It follows, I think, that they are bound by his undertaking; and that they must either give their promissory note, or, in the events which have happened, pay the money. Indeed, if the action had been against them alone, their very able counsel felt that unless he could get rid of the verdict, he could not resist this consequence. But he contended that as the action had been brought against the society as well as the directors the claims were inconsistent, and that if I held the society liable I could not at the same time hold the directors liable. The claims do not seem to me, however, to be inconsistent. I have said that I think the society might and did hold out Keighley Lea as having authority to do what he did, and to receive the money for them. I also think that the directors might well, and did in fact, hold him out as having authority from them

(1) Law Rep. 5 Ch. App. 4. (2) Law Rep. 5 Ch. App. 309.

to undertake for them, that they should give their promissory note. He did undertake for them, and they are bound by his undertaking.

I therefore give judgment for the plaintiffs against both sets of defendants and with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Cobbett & Co.*
Solicitors for defendant society: *Heywood & Son.*
Solicitors for defendant directors: *Sale & Co.*

SMITH *v.* MORGAN.

Feb. 27.

Executor—Administration—Assets of deceased Person—Priority of Judgment Creditor.

The priority which a judgment-creditor is entitled to in the administration of the assets of a deceased person under a decree in an administration suit, is not affected by s. 10 of the Judicature Act, 1875, whether such judgment be registered or not.

ON the 6th of November, 1876, one Thomas obtained a judgment for 38*l.* 14*s.* against the defendant as executor of Rees Morgan, deceased, for a debt due from the testator. This judgment was not registered, nor had execution been issued thereon, the testator's assets being in the hands of a receiver appointed by the county court of Glamorganshire on the 15th of November, 1876, in a suit for the administration of the assets of Morgan under the direction of that Court; and on the 12th of December a decree for administration was made.

On the 22nd of July, 1879, the judge of the county court, upon the application of Thomas, made an order declaring him to be entitled to the 38*l.* 14*s.*, and directing that sum to be paid to him out of the fund in court.

A rule having been obtained calling upon the plaintiff to shew cause why the order should not be set aside, on the ground that Thomas was not a "secured creditor" and had no priority,

Finlay shewed cause. A judgment-creditor has priority in the administration of the assets of a deceased person, even though his

1880

SMITH v. MORGAN.

judgment is not registered: *Jennings* v. *Rigby* (1); *Williams* v. *Williams*. (2) That right was not affected by 32 & 33 Vict. c. 46; neither is it by the 10th section of the Judicature Act, 1875 (38 & 39 Vict. c. 77), which, in substitution for subs. 1 of s. 25 of the Act of 1873 (36 & 37 Vict. c. 66), enacts that "in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, may come in under the decree or order for the administration of such estate, and make such claims against the same as they may respectively be entitled to by virtue of this Act." A judgment-creditor is not a secured creditor. The Court called on

Aspinall, to support the rule. The effect of s. 10 of the Judicature Act, 1875, is to do away with the priority of judgment and secured creditors in the administration of a testator's or an intestate's estate: *Ex parte Joselyne, In re Watt* (3); *In re Stanhope Silkstone Collieries Co.* (4)

LINDLEY, J. I am of opinion that the county court judge was right in holding that Thomas, the judgment-creditor, had priority in the administration of the assets of the testator. The doubt created by the 32 & 33 Vict. c. 46, was disposed of by the case of *Williams* v. *Williams*. (2) And s. 10 of the Judicature Act, 1875, does not apply to judgment debts.

Rule discharged.

Solicitors for plaintiff: *Hacon & Turner.*

Solicitors for defendant: *Ullithorne, Currey, & Co., for Simons & Plews, Merthyr Tydfil.*

(1) 33 Beav. 198.
(2) Law Rep. 15 Eq. 270.
(3) 8 Ch. D. 327.
(4) 11 Ch. D. 160.

BENNETT *v.* LORD BURY AND OTHERS. 1880

Practice—Stay of Proceedings at the Instance of the Plaintiffs in several Actions until one tried as a Test Action—Order XXIX, r. 1. *Feb.* 28.

Thirty-eight actions having been brought by different persons against the defendants as directors of an incorporated company, charging misappropriation of moneys advanced by the plaintiffs in different amounts and at different times, but all under similar circumstances:—

Held, upon the authority of *Amos* v. *Chadwick* (4 Ch. D. 869 and 9 Ch. D. 459), that it was competent to a judge at chambers, upon the application of the plaintiffs, to stay the proceedings in thirty-seven of the actions until after the trial of the thirty-eighth as a test action,—proper provision being made in case that action did not satisfactorily dispose of the question in all.

THIRTY-EIGHT actions were brought by as many different plaintiffs against the defendants who were directors of a company called "The Colonial Trusts Corporation, Limited," in respect of various sums deposited with them for investment. The writ in each case was indorsed for a sum received by the defendants for the purpose of investment.

In one of the actions, *Hull* v. *Lord Bury and Others* a statement of claim had been delivered, which amongst other things alleged that the defendants were directors of the company, a limited company incorporated under the Companies Act, 1862 (32 & 33 Vict. c. 89), for the purpose inter alia of the investment of moneys on account of and as trustees for persons desirous of investing money through their agency; that during and since the year 1859 the corporation received from the plaintiff sums for investment upon his account, and upon the terms that the moneys so invested which should be repaid to the corporation should be invested on similar securities or accounted for and paid to the plaintiff; that the moneys were invested by the corporation on account of the plaintiff, and that out of the said moneys or the moneys received by the corporation in re-payment of the investments or some of them, the corporation as the agents and trustees of the plaintiff during the years therein specified advanced moneys amounting to 8040*l.* on mortgage of certain lands specified in several mortgage deeds, the particulars of each of which was set

1880

BENNETT v. LORD BURY.

forth ; that, in the case of several of these mortgages, the defendants applied to the mortgagors for repayment of the principal sums, and obtained the same upon the faith of their representations that they were the agents of the plaintiff to receive such moneys on his account, and in the belief on the part of the mortgagors that they the defendants had the plaintiff's authority to receive such payment. It then went on to negative the defendant's authority to receive such payments, and alleged that having obtained the said moneys the defendants concealed that fact from the plaintiff and retained and appropriated the said moneys to their own use, and permitted them to be employed for the purposes of private trade and speculation without the knowledge or sanction of the plaintiff.

On the 5th of February, 1880, Field, J., on the application of the plaintiffs in thirty-seven of the actions, made an order that all further proceedings in this action and in the thirty-six other actions should be stayed until after the trial of the action of *Hull* v. *Lord Bury and Others ;* and the order proceeded as follows:— "And I further order that the time for delivering the statements of claim shall be enlarged until after judgment shall have been given in the action of *Hull* v. *Lord Bury and Others,* the plaintiffs in all the actions respectively undertaking that the action of *Hull* v. *Lord Bury and Others* be treated as a test action and decisive of their respective rights, unless it should appear to the Court that the said test action had failed to be a real trial of the matter in issue therein, in which case the plaintiffs undertake to be bound by any order that the Court may think fit to make: the defendants to be at liberty to require the plaintiffs to proceed with their respective actions, if dissatisfied with the result of the test action: the plaintiffs respectively to deliver within ten days particulars of their claims and of the mode in which the amounts sought to be recovered are alleged to have been employed by the defendants; the defendants to be at liberty to apply for an order that any of the said actions shall be forthwith proceeded with, upon satisfying the Court or a judge that there is a special ground of defence not raised in the test action."

Lord Bury and Mr. Montgomerie, two of the defendants in all the actions, moved to rescind this order.

Herschell, Q.C., and *Reginald Brown*, for Montgomerie, submitted that such an order could only be properly made at the instance of a defendant, and that the only instance in which it had been made on the motion of the plaintiffs was a case in equity, viz. the case of *Amos* v. *Chadwick* (1), the circumstances of which were altogether different from those of the cases before the Court, inasmuch as there the cause of action of each of the plaintiffs was identically the same, whereas here no two of the actions would turn upon the same facts. No one of the actions can properly be called a test action.

[LORD COLERIDGE, C.J. That is provided for by the order: the other defendants are not bound by the result of the test action.]

Lumley Smith, for Lord Bury, submitted that at all events all the actions ought to be allowed to go on until the pleadings were complete, when a fair order might be made.

Butt, Q.C., and *J. C. Mathew*, contrà, were not called upon.

LORD COLERIDGE, C.J. I am of opinion that the order of my Brother Field was correct and ought to be affirmed. This is an application on the part of certain defendants to rescind an order to stay the proceedings in thirty-seven actions against them until after the trial of the thirty-eighth, under these circumstances:— The thirty-eight plaintiffs had under varying circumstances deposited moneys for investment by a corporation of which the defendants are directors, in colonial or other securities; and the charge against them in substance is that they, being directors of the corporation, have received from the depositors various sums of money for investment, and, having in the first instance invested such moneys on mortgages, and having received them back from the mortgagors, have applied them in part to their own use, and as to other part have appropriated them to purposes other than the legitimate purposes of the corporation, without the assent of the plaintiffs. It is true the incidents will or may vary in each case, and that there will be differences of proof in each: but the gist of the charge is the same in all; the fraud charged in each of the thirty-eight actions is identically the same, viz. the

(1) 4 Ch. D. 869; 9 Ch. D. 459.

1880

BENNETT v. LORD BURY.

wrongful appropriation of the moneys of the plaintiffs to purposes unauthorized by them. The order of my Brother Field was that the proceedings in the action of *Bennett* v. *Bury* and in all the other thirty-six actions should be stayed until after the trial of *Hull* v. *Bury* the plaintiffs in those several actions undertaking that *Hull* v. *Bury* should be treated as a test action and decisive of their respective rights, unless it should appear to the Court that the trial of that action had failed to be a real trial of the matter in issue therein, in which case the plaintiffs undertook to be bound by any order that the Court might think fit to make; and further that the defendants were to be at liberty to apply for an order that any of the actions shall be forthwith proceeded with, upon satisfying the Court or a judge that there is a special ground of defence not raised in the test action. That would be quite right: *Hull* v. *Bury* might prove not to be a test action; therefore my Brother Field's order very properly provides for that contingency. Two objections were urged against this order. First, that it is an entirely novel proceeding,—an attempt by plaintiffs to consolidate, and not by defendants. That objection, I think, is answered by the case of *Amos* v. *Chadwick*. (1) There, seventy-eight actions were brought by different plaintiffs against the same defendants in respect of an alleged misrepresentation in the prospectus of a company; and Malins, V.C., upon the application of the plaintiffs, ordered that one of the actions should be tried as a representative action, and that the proceedings in the others should be stayed, the plaintiffs in all the other actions undertaking to abide by such order as the Court might think fit to make on the determination of the representative action; and the Court of Appeal, consisting of Jessel, M.R., and Lords Justices Brett and Cotton, held that the questions in all the actions being substantially the same, if all were tried, the order was well made under the general power of the Court to prevent a scandal in the administration of justice. It is plain, therefore, that my Brother Field had power to make the order which was made in the present case; and, if ever there was a case for the exercise of such a discretionary power, this is that case. The order provides for every difficulty which could arise.

(1) 4 Ch. D. 869; 9 Ch. D. 459.

Then Mr. Herschell contends that the defendants have a right to have all the actions proceeded with, or dismissed for want of prosecution. But it seems to me that Order XXIX meets this very case. The 1st rule of that Order provides that "if the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may at the expiration of that time apply to the Court or a judge to dismiss the action with costs, for want of prosecution; and, on the hearing of such application, the Court or judge may, if no statement of claim have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as to the Court or judge shall seem just." What judge would dismiss for want of prosecution thirty-seven actions when the proceedings in one, the determination of which will in all probability dispose of the whole question, are honestly being proceeded with to be tried to the end? I cannot conceive that any such order would be made. If so, there is an end of the only argument in Mr. Herschell's favour. The only way the order hurts him is the saving of the running of the Statute of Limitations. Upon the reason of the thing, therefore, as well as upon the authority of *Amos* v. *Chadwick* (1), I think the order of my Brother Field is right and should be affirmed. The only doubt I have entertained is whether the several actions should not be allowed to go on as far as the delivery of the statement of claim; but that difficulty is removed by the provision in the order for giving in each case the particulars of the claims in each action as well as of the mode in which the amounts sought to be recovered are alleged to have been employed by the defendants. The order therefore provides for everything the defendants can reasonably require; and the appeal must be dismissed with costs.

LINDLEY, J. I am of the same opinion. The first thing that strikes one is this, whether or not there has been on the part of the plaintiffs an abuse of the process of the Court by bringing several actions simultaneously in respect of a matter which is more or less common to all the plaintiffs. If that were the case, one would know how to deal with it. The obvious reasons, however, for bringing several actions, are, the one, to save any question as

(1) 4 Ch. D. 869; 9 Ch. D. 459.

1880

BENNETT v. LORD BURY.

to the Statute of Limitations, and the other to obviate an equally nice question as to whether an action by one on behalf of himself and others would lie under the circumstances of this case. I must confess I do not see how the defendants can be hurt by this order. It is true it has the effect of keeping several actions hanging over their heads. The only way of preventing that has been suggested by my Lord. On the other hand, the order prevents the defendants from being subjected to the unnecessary burden of the costs of thirty-eight actions, when the whole matter in controversy may be settled in one. As to our power to do what is done by this order, if authority were needed, *Amos* v. *Chadwick* (1) supplies it. I must confess I should have thought without that case that there was abundant power to make such an order. It comes therefore to a question of discretion; and I think my Brother Field has properly exercised his discretion in what he has done.

Appeal dismissed.

Solicitors for plaintiff: *Markby & Stewart.*

Solicitors for defendants: *White, Borrell, & White,* and *Linklater & Co.*

March 6.

BYRNE & Co. *v.* LEON VAN TIENHOVEN & Co.

Contract—Sale of Goods—Offer—Acceptance—Withdrawal of Offer—Letter posted before but received after Acceptance.

An offer of a contract sent by letter cannot be withdrawn by merely posting a subsequent letter which does not, in the ordinary course of the post, arrive until after the first letter has been received and answered.

By letter of the 1st of October the defendants wrote from Cardiff offering goods for sale to the plaintiffs at New York. The plaintiffs received the offer on the 11th and accepted it by telegram on the same day, and by letter on the 15th. On the 8th of October the defendants posted to the plaintiffs a letter withdrawing the offer. This letter reached the plaintiffs on the 20th:—

Held, by Lindley, J., that the withdrawal was inoperative, a complete contract binding both parties having been entered into on the 11th of October when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose was withdrawn.

ACTION tried at Cardiff assizes, before Lindley, J., without a jury.

(1) 4 Ch. D. 869; 9 Ch. D. 459.

B. T. Williams and *B. Francis Williams*, for the plaintiffs.
M'Intyre, Q.C., and *Hughes*, for the defendants.

1880

BYRNE v. VAN TIENHOVEN.

Cur. adv. vult.

March 6. LINDLEY, J. This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1000 boxes of tinplates, pursuant to an alleged contract, which I will refer to presently. The action was tried at Cardiff before myself without a jury; and it was agreed at the trial that in the event of the plaintiffs being entitled to damages they should be 375*l.*

The defendants carried on business at Cardiff and the plaintiffs at New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The alleged contract consists of a letter written by the defendants to the plaintiffs on the 1st of October, 1879, and received by them on the 11th, and accepted by telegram and letter sent to the defendants on the 11th and 15th of October respectively. These letters and telegram were as follows:—[The learned judge read the letter of the 1st of October, 1879, from the defendants to the plaintiffs. It contained a reference to the price of tinplates branded "Hensol," and the "offer of 1000 boxes of this brand 14 × 20 at 15*s.* 6*d.* per box f. o. b. here with 1 per cent. for our commission; terms, four months' bankers' acceptance on London or Liverpool against shipping documents, but subject to your cable on or before the 15th inst. here." The answer was a telegram from the plaintiffs to the defendants sent on the 11th of October, 1879: "Accept thousand Hensols." On the 15th of October, 1879, the plaintiffs wrote to the defendants: "We have to thank you for your valued letter under date 1st inst., which we had on Saturday P.M., and immediately cabled acceptance of the 1000 boxes 'Hensol,' 1c. 14/20 as offered. Against this transaction we have pleasure in handing you herewith the Canadian Bank of Commerce letter of credit No. 78, October 13th, on Messrs. A. R. McMaster & Brothers, London, for 1000*l.* . . . Will thank you to ship the 1000 'Hensols' without delay."] These letters and telegram would, if they stood alone, plainly constitute a contract binding on both parties. The defendants in their pleadings say that there

1880

BYRNE v. VAN TIENHOVEN.

was no sufficient writing within the Statute of Frauds, and that they contracted only as agents; but these contentions were very properly abandoned as untenable, and do not require further notice. The defendants, however, raise two other defences to the action which remain to be considered. First, they say that the offer made by their letter of the 1st of October was revoked by them before it had been accepted by the plaintiffs by their telegram of the 11th or letter of the 15th. The facts as to these are as follows: On the 8th of October the defendants wrote and sent by post to the plaintiffs a letter withdrawing their offer of the 1st. The material part of this letter was as follows: "Confirming our respects of the 1st inst. we hasten to inform you that there having been a regular panic in the tinplate market during the last few days, which has caused prices to run up about twenty-five per cent. we are reluctantly compelled to withdraw any offer we have made to our constituents, and must therefore also consider our offer to you for 1000 boxes 'Hensols' at 17*s.* 6*d.* to be cancelled from this date." This letter of the 8th of October reached the plaintiffs on the 20th of October. On the same day the plaintiffs telegraphed to the defendants demanding shipment, and sent them a letter insisting on completion of the contract. [The learned judge read the letter. In it the plaintiffs expressed astonishment at the contents of the letter of the 8th, recapitulated the transactions, and said "practically and in fact a contract for 1000 boxes came into existence between you and ourselves. It requires the consent of both parties to a contract to cancel same. If instead of writing to us on the 8th you had cabled 'offer withdrawn,' you would have protected yourselves and us too. We disposed of the 1000 boxes on the 17th at a net profit of 1850 dollars. . . We write our friend Philip S. Philips, Esq., of Aberkllery, requesting him to call on you and demand delivery as agreed." In a postscript they added, "You speak of offer of 1000 boxes Hensol at 17*s.* 6*d.* The only firm offer we received from you under date 1st of October was 1000 boxes at 15*s.* 6*d.*, and ten per cent. f. o. b. Cardiff; we cable you to-night 'demand shipment.'"] This letter is followed by one from the defendants to the plaintiffs of the 25th of October refusing to complete. [The learned judge read it. The defendants acknowledged the receipt

of the cable message of the 20th, inclosed the credit note sent in the letter of the 15th, and added, "Our offer having been withdrawn by our letter of the 8th inst. we now return the above credit, for which we have no further need, but take this opportunity to observe that in case of any future business proposals between us, we must request you to conform to our rules and principles, which require bankers' credit in this country, whereas the firm of A. R. McMaster & Brothers are not classified as such."]

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not: *Routledge* v. *Grant*. (1) For the decision of the present case, however, it is necessary to consider two other questions, viz.: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?

It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States: see *Tayloe* v. *Merchants Fire Insurance Co.* (2) cited in Benjamin on Sales, pp. 56–58, and it is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock in his excellent work on Principles of Contract, ed. ii., p. 10, and by Mr. Leake in his Digest of the Law of Contracts, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question,

(1) 4 Bing. 653.

(2) 9 How. Sup. Ct. Rep. 390.

1880

BYRNE v. VAN TIENHOVEN.

viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st of October, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted: *Harris' Case* (1); *Dunlop* v. *Higgins* (2), even although it never reaches its destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as communicated to the plaintiff on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tin plates at a profit. In my opinion the withdrawal by the defendants on the 8th of October of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on the 11th of October, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal

(1) Law Rep. 7 Ch. 587. (2) 1 H. L. 381.

principles, and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.

The defendants' next defence is that, as the plaintiffs never sent a banker's acceptance on London or Liverpool as stipulated in the contract, they cannot maintain any action for its breach. The correspondence which preceded the contract satisfies me that the defendants attached importance to this particular mode of payment; and although the plaintiffs sent letters of credit which were practically as good as a banker's acceptance, yet I cannot say that they did in fact send a banker's acceptance according to the contract.

By the terms of the contract bankers' acceptances on London or Liverpool were to be sent against,—i.e., were to be exchanged for—shipping documents; and if the defendants had been ready and willing to perform the contract on their part on receiving proper bankers' acceptances, I should have been of opinion that the plaintiffs would not have sustained this action. But it is perfectly manifest from the correspondence that the defendants did not refuse to perform the contract on any such ground as this. It is true that the defendants in their letter of the 31st of October, say that, "even if we had not withdrawn our offer we would all the same have returned your credit," and the defendants' solicitors in their letter of the 26th of November, say that, "if your clients (i.e. the plaintiffs), had fulfilled the terms of the contract at the outset the goods were ready to be shipped;" but the defendants' own letters of the 8th, 13th, and 25th of October, shew conclusively that this was not the case and that the defendants stood on their notice of withdrawal and would not have performed the contract even if bankers' acceptances had been sent. Their letter of the 25th of October in which they return the plaintiffs' first letter of credit is explicit on this point. The defendants do not return the letter of credit because it is not a banker's acceptance, but because the offer was withdrawn; and the inference I draw from that letter is that if the offer had not been withdrawn the defendants would not have returned the letter of credit although in future transactions they might have been more

1880

BYRNE v. VAN TIENHOVEN.

particular. In face of this refusal, it was useless for the plaintiffs to send a banker's acceptance, and although when they found their first letter of credit returned they sent another which was declined, still the defendants never receded from their first position, or expressed any readiness to ship the goods on receiving a banker's acceptance; and it is plain to my mind that they were not prepared to do so. On the other hand, I am satisfied that if the defendants had taken this ground the plaintiffs would have sent bankers' acceptances in exchange for shipping documents, and I infer as a fact that the plaintiffs always were ready and willing to perform the contract on their part, although they did not in fact tender proper bankers' acceptances. It was contended that by pressing the defendants to perform their contract the plaintiffs treated it as still subsisting and could not treat the defendants as having broken it, and a passage in Mr. Benjamin's book on Sales, p. 454, was referred to in support of this contention. But, when the plaintiffs found that the defendants were inflexible, and would not perform the contract at all, they had, in my opinion, a right to treat it as at an end and to bring an action for its breach. It would indeed be strange if the plaintiffs by trying to persuade the defendants to perform their contract were to lose their right to sue for its non-performance when their patience was exhausted. The authorities referred to by Mr. Benjamin (viz., *Avery* v. *Bowden* (1) and others of that class), shew that as the plaintiffs did not when the defendants first refused to perform the contract, treat that refusal as a breach, the plaintiffs cannot now treat the contract as broken at the time of such refusal. But I have found no authority to shew that a continued refusal by the defendants to perform the contract cannot be treated by the plaintiffs as a breach of it by the defendants. On the contrary *Ripley* v. *McClure* (2), and *Cort* v. *Ambergate, &c., Ry. Co.* (3) shew that the continued refusal by the defendants operated as a continued waiver of a tender of bankers' acceptances and enable the plaintiffs to sustain this action. In the present instance it is not necessary to determine exactly when the contract can be treated by the plaintiffs as broken by the

(1) 5 E. & B. 714. (2) 4 Ex. 345.
(3) 17 Q. B. 127.

defendants. It is sufficient to say that whilst the plaintiffs were always ready and willing to perform the contract on their part the defendants wrongfully and persistently refused to perform the contract on their part; and before action there was a breach by the defendants not waived by the plaintiffs. For the reasons above stated I give judgment for the plaintiffs for 375*l.* and costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Robinson, Preston, & Stow, for Colborne & Ward, Newport, Monmouthshire.*

Solicitors for defendants: *Ingledew & Ince, for Ingledew, Ince, & Vachell, Cardiff.*

[IN THE COURT OF APPEAL.]

March 23.

LORD AVELAND, APPELLANT; LUCAS, RESPONDENT.

Highway—Repair—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77) *s.* 23—"*Excessive Weight*"—"*Extraordinary Traffic.*"

The appellant employed on a highway a traction-engine drawing two waggons for the carriage of materials and goods used for ordinary purposes on his estate (the engine being of less weight than was allowed by s. 28 of the Highways and Locomotives (Amendment) Act, 1878, and having its wheels constructed in accordance with the provisions of that section), and thereby did damage to the highway beyond that caused by the ordinary wear and tear:—

Held, that this was "excessive weight" and "extraordinary traffic," the damage caused by which was properly chargeable upon the appellant under s. 23 of the Act.

Judgment of the Common Pleas Division, ante, p. 211, affirmed.

APPEAL from the decision of the Common Pleas Division affirming an order, whereby the appellant had been ordered to pay a sum of money to the respondent pursuant to the provisions of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23.

The facts are fully stated in the report of the proceedings before the Common Pleas Division (1), and it is unnecessary to repeat them here.

March 22, 23. *W. Graham*, for the appellant. The finding of

(1) Ante, p. 211.

1880

LORD AVELAND v. LUCAS.

the justices was wrong: upon the facts stated in the case there is no evidence of extraordinary traffic; moreover the appellant was authorized to do what he did by the Highways and Locomotives (Amendment) Act, 1878, Part II., and he ought not to be mulcted for committing a lawful act. Again, the weight cannot be excessive nor the traffic extraordinary, for if the appellant had not used the engines and waggons, the same amount of material would have been carried over the highway in carts and waggons drawn by horses.

Bompas, Q.C., and *J. Etherington Smith*, were not called upon to argue for the respondent.

BRAMWELL, L.J. The justices have found that the facts of the case are within the mischief aimed at by the statute, and that extraordinary expenses have been incurred within the parish in question: and assuredly I should have come to the same conclusion. It has been contended before us that there was no evidence of extraordinary traffic; but it is plain that the appellant has caused an unusual amount of damage, and the burden of repairing it falls in the first instance upon the inhabitants of the parish. It has been urged that he only did what he had a right to do; but it is to be observed that the statute in question does not authorize anything which was not lawful before; it only regulates the passage of engines over highways. It has been further argued that the weight cannot be excessive, nor the traffic extraordinary, because, if the engines and waggons had not been used, the same amount of material would have been carried over the highway in carts and waggons drawn by horses. This is an argument which at first sight may seem difficult to be answered; but it may be pointed out that locomotives may not leave a trace upon hard roads, whereas upon roads repaired with soft sandstone much damage may be done by excessive weight. It is difficult to lay down any rule whether any particular facts fall within the provisions of s. 23 of the Highways and Locomotives (Amendment) Act, 1878; but it is impossible to say that the enactments as to locomotives have authorized the injury which has been done to the road in the respondent's parish. The appellant may be liable to an indictment for a nuisance; but instead of that inconvenient

procedure a simple remedy is given for the injury which he may commit. It was not meant to put a tax upon locomotives; but they must not be made the means of putting a tax upon the neighbourhood. If the profit earned by a locomotive is not sufficient to enable its owner to pay all expenses connected with it, it is a loss to the community. The order of the Common Pleas Division must be affirmed.

BAGGALLAY, L.J. The surveyor has given a certificate that extraordinary expenses have been incurred in repairing a highway by excessive weight and extraordinary traffic thereon, and the justices have found that the facts fall within the remedy introduced by the statute. It has been urged that locomotives ought not to be subjected to any increased charge, inasmuch as they have been lawfully used. I cannot agree to that argument: it is provided that the expense of repairing the damage shall be borne by the person who causes it, even although he is making a lawful user of the highway. The enactment is intended to apply to cases where the user has been lawful.

THESIGER, L.J., concurred.

Judgment affirmed.

Solicitors for appellant: *Whyte, Collisson, & Prichard, for Atter, Stamford.*

Solicitors for respondent: *Vizard & Crowder, for Owston & Dickenson, Leicester.*

1880
Aug. 7.

BURLINER *v.* ROYLE AND ANOTHER.

Bankruptcy—Composition — Debt — Bills given — Dishonoured — Statement of Amount—Original Cause of Action—32 & 33 *Vict. c.* 71, *s.* 126.

Being indebted to the plaintiff for goods sold to the amount of 143*l.* 12*s.* 9*d.*, the defendants gave him bills for the sum, less discount, but adding interest, so that the amount of the bills was 142*l.* 7*s.* 3*d.* These bills were dishonoured. The defendants compounded with their creditors under s. 126 of the Bankruptcy Act, 1869, and, in the statement of debts, entered the amount of the debt due to the plaintiff, a non-assenting creditor, as 142*l.* 7*s.* 3*d.*, viz., the amount of the bills. The plaintiff sued for 143*l.* 12*s.* 9*d.*, the original debt. The defendants pleaded the composition:—

Held, by Lopes, J., that the original cause of action was suspended but not satisfied by the bills, and revived when they were dishonoured; that, therefore, at the date of the composition, the amount of the debt due to the plaintiff was 143*l.* 12*s.* 9*d.*, and, as it was not correctly shewn in the statement, the composition was no bar to his action.

FURTHER CONSIDERATION.

The action was for a debt. The defence set up a composition under s. 126 of the Bankruptcy Act, 1869.

The facts of the case were thus stated in the judgment of Lopes, J.

The defendants had purchased goods of the plaintiff on the following terms,—On the 1st of each month invoices were to be sent in, including all goods up to the 20th day of the preceding month. Ten per cent. was to be taken in any case off the gross amount, and 2½ per cent. on the balance after the deduction of the 10 per cent. if cash was paid, but not otherwise. In these circumstances, the defendants became indebted to the plaintiff in the sum of 143*l.* 12*s.* 9*d.*, i.e. the gross sum less 10 per cent., but including the 2½ per cent., which was not deductable because cash had not been paid. The defendants, not being able to pay, gave the plaintiff two bills for 81*l.* 11*s.* 3*d.* at three months, and for 60*l.* 16*s.* at two months, respectively; total 142*l.* 7*s.* 3*d.* This sum was arrived at by deducting from the gross amount the 10 per cent. and 2½ per cent., and adding interest at 5 per cent. during the currency of the bills. These bills were not paid at maturity.

1880

BURLINER v. ROYLE.

The defendants went into liquidation, and compounded with their creditors. The plaintiff was a non-assenting creditor. The defendants entered the plaintiff in their statement as a creditor for 142*l.* 7*s.* 3*d.* (the amount of the bills), and not for 143*l.* 12*s.* 9*d.*, the amount of the debt.

Bigham, for the plaintiff. The composition was not binding on the plaintiff because the amount due to him was not shewn in the statement of the debtor. The amount which should have been shewn therein was that of the original debt and not that of the bills given in respect of it. The effect of taking the bills for it was merely to suspend the remedy and not to extinguish the original cause of action. On the dishonour of the bills the right revived: *In re Cumberland. Ex parte Worthington.* (1) 32 & 33 Vict. c. 71 (The Bankruptcy Act, 1869), s. 126, must be strictly complied with. By that section the provisions of a composition shall be binding on all the creditors whose names and addresses and the "amount of the debts" due to whom, are shewn in the statement of the debtor . . . but shall not affect or prejudice the rights of any other creditors. "The amount" is the sum due, and it must be exactly stated. Substantial compliance with the section will not suffice. In *ex parte Mathewes, In re Angel* (2), an acceptor of bills which had not to his knowledge been negotiated, took proceedings for liquidation by composition, and in his list of creditors entered the drawer as his creditor for the amount of the bills without stating that the debt was due on bills of exchange. The bills had in fact been negotiated, and the holder received no notice of the meeting of creditors. The Court held that the holder was not bound by the resolutions at the meeting and was entitled to pursue his remedies irrespectively of them. Mellish, J., said the question was whether the debtor was discharged. "He cannot be discharged unless the Act says so, and we cannot alter the Act even if such a case as this should appear to be omitted from it by oversight."

The conditions of s. 126 are for the benefit of creditors, and must be strictly fulfilled by the debtor: see *Wilson* v. *Breslauer* (3),

(1) 3 Ch. D. 803. (2) Law Rep. 10 Ch. 304.
(3) 2 C. P. D. 314; 3 App. Cas. 672.

1880

BURLINER v. ROYLE.

Ex parte Lang (1), *Ex parte Jerningham, In re Jerningham.* (2) By slightly understating the amounts of many different debts, the debtor could gain a considerable aggregate sum, if the composition founded on such statement were binding on non-assenting creditors.

Crispe and *Phipson*, for the defendants. First. There was a novation. The bills *In re Cumberland* (3) were for the exact amount of the goods less discount. Here the bills were for a new consideration, viz., interest.

Secondly. Sect. 126 has been substantially complied with. In *Ex parte Mathewes* (4) the creditor's name was not entered in the statement. Here the name was entered therein. It is evident, from the judgment in *Ex parte Jerningham* (2), that a merely formal defect will not invalidate the composition. There may be two kinds of composition under the section—one where there is no trustee appointed, the other where there is a trustee: see per Brett, J., *Campbell* v. *Im Thurn.* (5) Here there was one. He should have inquired and ascertained the amount of the debt, as he is entitled to do: *Ex parte Botting. In re Bostel.* (6) The debtor is not liable for the default of the trustee: *Ex parte Waterer, Re Taylor.* (7)

Cur. adv. vult.

Aug. 7. LOPES, J. All allegations of fraud were withdrawn by the plaintiff. There is only one question left in the case which the parties agreed to leave to me. That question is whether the defendants (compounding debtors) have so complied with the 126th section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), as to prevent the plaintiff (a non-assenting creditor) from recovering the full amount of his debt. [After stating the facts as above set forth, the learned judge proceeded:—]

It was contended that the taking the bills with interest constituted a new agreement, and that, the old debt being extinguished, the amount in the debtor's statement (142*l.* 7*s.* 3*d.*) was correct.

(1) 5 Ch. D. 971.
(2) 9 Ch. D. 466.
(3) 3 Ch. D. 803.
(4) Law Rep. 10 Ch. 304.
(5) 1 C. P. D. 267.
(6) Law Rep. 19 Eq. 261.
(7) 43 L. J. (Bkcy.) 25.

1880

BURLINER v. ROYLE.

I cannot adopt this view. I think the effect of giving the bills was, to suspend the original cause of action only, which was not satisfied, but revived when the bills were not paid at maturity. At the time of the liquidation, therefore, the debt due to the plaintiffs was 143*l.* 12*s.* 9*d.*, and the amount shewn in the debtor's statement only 142*l.* 7*s.* 3*d.*

The Bankruptcy Act, 1869, s. 126, par. 7, enacts that the provisions of a composition accepted by an extraordinary resolution in pursuance of this section, shall be binding on all the creditors whose names and addresses and the amount of the debts due to whom are shown in the statement of the debtor produced at the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors.

Has the amount of the debt due to the plaintiff in this case been correctly shewn in the debtor's statement? I think not. I entirely concur with Brett, J., when in *Wilson* v. *Breslauer* (1) he says, that if a creditor who is non-assenting or dissenting is to be bound, all the requisites to bind non-assenting or dissenting creditors must be strictly complied with. The names of the creditors must be inserted in the statement of affairs of the debtor, and the amount of the debts; and unless both these conditions are fulfilled, the creditor will not be bound by the composition. The same opinion is expressed by Cotton, L.J., in *Re Jerningham* (2), and by James, L.J., in *Ex parte Lang.* (3)

I therefore give judgment for the plaintiff for 143*l.* 12*s.* 9*d.* and costs.

Judgment for the plaintiff.

Solicitor for plaintiff: *Goldberg & Langdon.*

Solicitor for defendants: *Godden.*

(1) 2 C. P. D. 314, at p. 332. (2) 9 Ch. D. 466, at p. 468.
(3) 5 Ch. D. 971, at p. 973.

1880
May 3.

TAYLOR *v.* M'KEAND AND ANOTHER.

Bill of Sale—Stock in Trade—Implied Licence to dispose of Goods—Licence to deal with them in the ordinary course of business—Fraudulent Sale.

16 C.L.D. 311
6 Q.B.D. 621

B., a trader, assigned to the plaintiff his stock-in-trade by a bill of sale with a proviso that until default in payment of the money advanced B. should be entitled to make use of such stock without hindrance or disturbance on the part of the grantee. B. afterwards sold the goods to the defendants by private contract, and absconded. The jury found that "B. sold the goods fraudulently, and not in the ordinary course of his business; but the defendants did not know this, and bought the goods bonâ fide:—

Held, that, upon this finding, the verdict was properly entered for the plaintiff: the right of the grantor to deal with the goods being subject to the implied condition that the dealing should be only in the ordinary course of his business.

ACTION for wrongful conversion of the plaintiff's goods.

On the 1st of October, 1878, one Bass, a draper in Peckham, in consideration of a loan of money, assigned to the plaintiff by bill of sale, amongst other things, his stock-in-trade, covenanting to repay the money on demand, Bass in the meantime and until default to hold and make use of the goods without hindrance or disturbance on the part of the grantee. On the 24th of October (and before any default made), the defendants, who were also drapers, purchased of Bass, by private arrangement through an auctioneer, his book-debts, and also the goods in question, which formed part of the stock-in-trade conveyed to the plaintiff by the bill of sale, for 13*l.* 1*s.* 3*d.* Bass immediately afterwards absconded.

At the trial before Lopes, J., at the last sittings in Middlesex, it was contended for the plaintiff that the sale not being a sale by the grantor of the bill of sale in the ordinary course of his business, no property in the goods passed thereby to the defendants.

The learned judge left it to the jury to say whether Bass sold the goods in the ordinary course of his business. The jury found that "Bass sold the goods fraudulently, and not in the ordinary course of his business; but the defendants did not know this, and bought the goods bonâ fide."

Judgment was thereupon entered for the plaintiff.

1880

TAYLOR v. M'KEAND.

A rule nisi for a new trial having been obtained on the ground of misdirection,

Douglas Kingsford, shewed cause. The question was properly left to the jury. If Bass parted with the stock otherwise than in the ordinary course of his business of a draper, he did so in fraud of the bill of sale. The bona fides of the buyers was wholly immaterial. The very object of the grantee in making the advance was to enable the grantor to continue to carry on his business, not to stop it. The latter could not transfer any property in the goods by a sale otherwise than in the ordinary course of his business, which the jury have negatived: *Cochrane* v. *Rymill* (1); *National Mercantile Bank* v. *Hampson*. (2)

Oppenheim, in support of the rule. At the time the defendants bought the goods Bass was in possession of them with the consent of the plaintiff, appearing to the world as the owner and entitled to deal with them; no demand having then been made, and consequently no default. The finding, therefore, that the defendants bought the goods bonâ fide, and in ignorance of any fraud on the part of Bass, was most material. It is a fundamental principle that, if one of two innocent persons must suffer by the wrongful act of a third, he who by his conduct enables that third person to do the wrong must bear the loss. The learned judge ought to have told the jury that, if the defendants purchased the goods bonâ fide and without a knowledge of what was passing in the mind of Bass, the plaintiff must fail.

[DENMAN, J. However exceptional and out of the ordinary course of business the transaction might be?]

Yes. The intention of Bass was not the true question. The evil result here was due to the laches of the plaintiff: *Walker* v. *Clay*. (3)

LORD COLERIDGE, C.J. I am of opinion that this rule should be discharged. The action is brought by the holder of a bill of sale, whereby, amongst other things, certain stock-in-trade of the grantor were assigned to the plaintiff. These goods the grantor

(1) 27 W. R. 776. (2) 5 Q. B. D. 177.
(3) 42 L. T. 369.

1880

TAYLOR v. M'KEAND.

sold to the defendants. The jury found that the grantor sold the goods fraudulently and not in the ordinary way of business; but that the defendants did not know this, and bought the goods bonâ fide. Under these circumstances can the defendants hold the goods? I think they cannot. They were the goods of the plaintiff by a perfectly valid contract,—a contract which is by statute declared invalid only as against certain persons of whom the plaintiff is not one. That amounts to a parliamentary recognition of the goodness of the plaintiff's title to the goods. How is that got rid of? It is said that a bill of sale of stock-in-trade, when the trade is to be carried on, must always be subject to an implied condition that the grantor shall have liberty to deal with the goods for the purposes of the business; and that, if that were not so, it would stop the business altogether, which would be contrary to the intention of the parties. But, in expressing that condition, the law ingrafts upon it this limitation, that the business must be carried on bonâ fide, and the disposition of the goods must be bonâ fide and in the ordinary course of business. That is the state of the law as laid down in *National Mercantile Bank* v. *Hampson* (1) in the Queen's Bench Division. That state of the law will not protect the defendants here, inasmuch as the goods in question were not sold in the ordinary course of business. The exact words which I have used are not found in the judgment of my Brother Lush as given in the Law Reports: but I cannot help thinking that they were intended to be implied. In the first place, in the absence of that qualification the security would be gone; and, in the next place, I think it is clear from the pleadings that the defence rested upon it; for, the statement of defence alleged that Seaman sold the wheat to the defendant, and the defendant bought the same in the ordinary course of his business and without any notice that it did not belong to Seaman; that Seaman was suffered by the plaintiffs to carry on his business as a farmer and dealer in grain at the time of the sale; and that it was in the ordinary course of Seaman in such business to make such sale. Lush, J., in giving judgment, says: "There was an implied licence for the grantor to carry on his business and to sell the wheat." Here the defendants have bought property of another which the vendor

(1) 5 Q. B. D. 177.

had no right to sell, because he did not sell it in the only way in which he could sell, viz. in the ordinary course of business. Then it is said that, if one of two innocent persons must suffer by the wrongful act of a third person, he who by his conduct enabled that third person to do the wrong must bear the loss. I do not say that that is not correct as a general proposition. But here the holder of the bill of sale,—an instrument known to the law, by which the property is taken out of the grantor and conveyed to the grantee absolutely, save in certain excepted cases, of which this is not one,—claims to recover his property, of which the defendants have possessed themselves in a manner which is not warranted by the terms of the bill of sale or by any legal implication from them. I think the ruling of my Brother Lopes was right, and that this rule must be discharged.

DENMAN, J., concurred.

Rule discharged.

Solicitor for plaintiff: *J. Laidman.*

Solicitors for defendants: *Hicklin & Washington.*

WYNNE, APPELLANT; FORRESTER, RESPONDENT.

1879

May 23.

Coal Mines Regulations Act, 1872 (35 & 36 *Vict.* c. 76)—*Agent, liability of*—*Inadequate Ventilation.*

The agent of a mine subject to the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76) may be convicted for breach of the regulations prescribed by ss. 51, 52 of the Act, although the mine is under the control of a duly certified manager.

CASE stated by a justice under 20 & 21 Vict. c. 43.

At a petty session at Longton, Stafford, on the 27th of November, 1878, a complaint preferred by the appellant, an inspector of mines, against the respondent, charging that the respondent, on the 1st of November, being the agent of a colliery called the Weston Coyney Colliery, in the parish of Caverswall, Stafford, did not cause an adequate amount of ventilation to be constantly produced in the mine of the said colliery, to dilute and render harmless noxious gases to such an extent that the working places of the

1879

WYNNE v. FORRESTER.

shafts, levels, &c., of such mines, &c., should be in a fit state for working and passing therein, contrary to the statute, &c., was heard by the justice, and dismissed.

The complaint was preferred under the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 51 of which enacts that the following general rules shall be observed, so far as is reasonably practicable, in every mine to which the Act applies,—

1. "An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless noxious gases to such an extent that the working places of the shafts, levels, stables, and workings of such mine and the travelling roads to and from such working places shall be in a fit state for working and passing therein."

31. "Every person who contravenes or does not comply with any of the general rules in this section shall be guilty of an offence against this Act; and, in the event of any contravention of or non-compliance with any of the said general rules, in the case of any mine to which this Act applies, by any person whomsoever, being proved, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules and regulations for the working of the mines, to prevent such contravention or non-compliance."

Every person who is guilty of an offence against this Act is by the 60th section of such Act made liable to a penalty not exceeding (if he is an owner, agent, or manager) 20*l.*

The mine in question is a mine to which the Act applies; and the respondent is the agent of the mine.

One George Hollins was at the date of the proceedings the duly appointed manager of the mine, and he holds a certificate under the Coal Mines Regulation Act, 1872.

On the 12th of October, 1878, the assistant inspector of mines for the district, visited the colliery and found that the ventilation of the mine was defective and inadequate, the defect having been caused by a fall in the roof of the mine; and he thereupon gave directions to the respondent, who accompanied him in the absence of the manager, to have the same remedied, which he promised should be done. On the 1st of November the inspector examined

the mine again, and still found the ventilation defective and inadequate for the safe working of the mine, and that nothing had been done for the purpose of removing the fall or improving the ventilation; and thereupon proceedings were commenced both against the respondent and Hollins, the certificated manager, for such offence.

It was proved that the ventilation in the mine was defective and inadequate, and that, in consequence thereof, the working places in the mine were not in a fit state for working and passing therein. It was also proved that Hollins was a duly certificated manager of the mine, and that the mine was worked under his directions. It was also proved that the respondent was the agent of the mine, and that occasionally, in the temporary absence of Hollins, which was about two days per week, he gave certain directions for the management of the mine.

The magistrate convicted Hollins as the certified manager of the mine, who in his judgment was responsible for the offence, and fined him 15*l.* and costs, which Hollins paid: and he dismissed the summons as against the respondent.

It was contended, on the part of the appellant, that upon the above facts having been proved, the magistrate was bound under the provisions of s. 51 of the Act, to convict the respondent as the agent of the mine as well as Hollins the manager. But the magistrate was of opinion that, though the assistant inspector on his first visit gave directions to the respondent to remedy the defect, the promise given by him was simply a promise that he would mention the matter to the manager, the person made responsible by the statute; for, by s. 26, it is expressly declared that every mine to which the Act applies shall be under the control and daily supervision of a manager, and that no mine shall be worked for more than fourteen days without there being such a manager; the intention of the enactment in his opinion being that there should be some person attached to the mine thoroughly conversant with mining operations, and who should be deemed responsible for the proper and safe working of the mine; and that, if the owner or agent (who might know little or nothing of the subject) were to share the responsibility with the manager, there would be a divided authority, which in the possible event

1879

WYNNE v. FORRESTER.

of a difference of opinion as to any remedies and alterations to be adopted might lead to serious results. He therefore dismissed the summons as against the respondent.

If the Court should be of opinion that the magistrate's view was wrong, the case was to be remitted to him with their opinion thereon, that he might hear and decide the case upon the evidence.

Gorst, Q.C. (*Lawrence,* with him), for the appellant. The magistrate in this case thought that he could not, in the absence of evidence of mens rea in him, convict the agent. That was so, no doubt, under the earlier Coal Mines Regulation Act, of 23 & 24 Vict. c. 151, ss. 10, 22: See *Dickenson* v. *Fletcher* (1), Brett, J., says: "Sect. 22 does not say, if the rule is not observed, the owners and agent shall be subject to a penalty. It says, if through the default of the owner or agent thereof, the rule has been neglected, then the penalty shall be incurred." "It appears to me that these words imply something more in the nature of a personal default." But in this Act the language is more stringent. Sect. 52 provides for the establishment of special rules for the conduct and guidance of the persons acting in the management of the mine, or employed in or about the same, to prevent accidents; and enacts that, "if any person who is bound to observe the special rules established for any mine acts in contravention of, or fails to comply with any of such special rules, he shall be guilty of an offence against this Act, and also the owner, agent, or manager of such mine, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing the said rules or regulations for the working of the mine, so as to prevent such contravention or non-compliance, shall each be guilty of an offence against this Act." As a rule, no doubt, in criminal cases, a person is only rendered liable for his own personal default or neglect; but by express enactment he may be rendered liable for the neglect of another.

No counsel appeared for the respondent.

LORD COLERIDGE, C.J. I am of opinion that the appellant is entitled to succeed. The observations of the magistrate would

(1) Law Rep. 9 C. P. 1.

have afforded a very good argument against the passing of the clause in question: and no doubt they were properly urged at the proper time. Nevertheless, the statute having passed in its present shape, we must deal with it as we find it. In my opinion it is plain from both the 51st and the 52nd sections, that it was intended to compel strict and constant attention by the heads of these establishments, by making them, agent as well as manager, personally liable unless they can shew that they have done their best to enforce the performance of the regulations by their subordinates. If they shew this, they will be exempt from liability; but primâ facie they are to be held responsible. It seems to me to be a very wise piece of legislation. The case must be remitted to the magistrate that he may decide it upon the evidence which may be brought before him.

LINDLEY, J. I am of the same opinion. Looking at the language of ss. 51 and 52, it is plain that, in the event of a contravention by any one of the rules and regulations for the working of the mine, the owner, the agent, and the manager are all liable to the prescribed penalty. If it had stopped there it would have been manifestly unjust. Opportunity is therefore given to those persons to relieve themselves from the consequences, by shewing that they have taken all reasonable means by publishing, and to the best of their power enforcing, the rules to prevent the contravention or noncompliance with them. Unless that is shewn they clearly ought to be held responsible. The scheme of the Act differs from what the magistrate seemed disposed to think. The case must be remitted to him.

Case remitted.

Solicitor for appellant: *W. Compton Smith.*

1880
May 3.

HARPER *v.* SCRIMGEOUR.

Debtors Act, 1869 (32 & 33 *Vict. c.* 62)—*Order of Commitment—Means of Judgment Debtor—Wife's separate Estate.*

The defendant was committed to prison for six weeks for default in payment of an instalment of 10*l.* pursuant to an order under the Debtors Act, 1869, upon an affidavit by the plaintiff that the defendant was residing in a large well-furnished house, keeping horses, carriages, a groom, and other servants, and living in the style of a country gentlemen of means; that he had been seen on several occasions at different towns and places with his horse and carriage, and always appeared to have money at his command; and that the plaintiff was informed and believed that he had ample means to pay the debt and costs in the action:—

Held, that the order of commitment must be affirmed, although the defendant swore that all the furniture, horses, carriages, and effects at the house above-mentioned belonged to his wife and were bought and maintained by her separate money and estate; that the groom and other servants were the servants of his wife and maintained at her sole expense; that he had no horse or carriage or any other property of his own, nor had he money at his command that would enable him to attend Court to answer the application, and his wife declined to supply him with any; and that he was unable to pay the debt and costs in the action.

MOTION by way of appeal against an order of Manisty, J., under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, committing the defendant to prison for six weeks for non-payment of an instalment of 10*l.* due in pursuance of an order in chambers. It appeared that the judgment had been obtained against the defendant in an action for the price of a horse purchased by him from the plaintiff; and the defendant had no effects upon which the debts and costs could be levied.

The affidavit of the plaintiff, upon which the order of Manisty, J., was made, was as follows:—I have known the defendant for upwards of twelve months. He has during such period resided and now resides in a large country house called Thorne House, at Minster, in the Isle of Thanet. The house is well furnished. He has horses, carriages, stables, and groom, besides domestic servants, and lives in the style of a country gentleman of means. I have seen him on several occasions at different towns and places with his horse and carriage; and he always appears to have plenty of money at his command. I am informed and believe that he has ample means to pay the debt and costs in this action; and he

has made default in payment of 10*l.* to me, as directed by the order of this Court.

The affidavit of the defendant in support of the application to discharge the order for his committal was as follows:—The furniture at Thorne House is not at my disposal. The horses and carriages belong to my wife, and were bought out of and are maintained by the separate moneys and estate of my said wife; and the groom and other domestic servants are the servants of my said wife and maintained at her sole expense. I have no horse or carriage of my own whatever; nor have I money at my command that would enable me to attend Court to answer this application; and my wife declines to supply me with any. I have not received 10*l.* since the order has been made, and therefore I cannot comply with the same. I have no means whatever, nor am I possessed of any property real or personal upon which I can raise money; and I am unable to pay the debt and costs in this action. I am unable to appear in person before this Court, as I have not the means to travel.

H. T. Atkinson, for the defendant. The power of committal under the Act can only be exercised where it is proved to the satisfaction of the Court that the person making default either has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same. The affidavit upon which the order was made discloses nothing to satisfy the Court that the defendant has the means to pay the sum in respect of which he has made default. The jurisdiction in question is only to be exercised upon distinct evidence that the party has or has had since the date of the order or judgment the means of complying with it. This is distinctly negatived by the affidavit of the defendant, which shews that the whole of the property at Thorne House, including the horses and carriages, is the separate estate of the defendant's wife bought and maintained out of her own moneys, and that the whole establishment is kept up at her sole cost. The Debtors Act was not intended to be made the means of charging the separate estate of a married woman with her husband's debts.

1880

HARPER v. SCRIMGEOUR.

Anderson, for the plaintiff, was not heard.

LORD COLERIDGE, C.J. I am of opinion that the order of my Brother Manisty was right. The affidavit of the plaintiff shews that the defendant has abundant means to satisfy this order; and the defendant's affidavit in answer by no means satisfies me that he has not ample means. I think this application must be dismissed with costs.

DENMAN, J. I am of the same opinion. I see nothing in the materials brought before us to warrant us in overruling the decision come to at chambers. As far as I can see, I agree with my Lord in thinking that the order was rightly made. It seems that the defendant has enough of his own from day to day and from week to week to keep horses and to appear to the world as a gentleman of means. It is idle to say that he is not able to procure money enough to answer this claim.

Application dismissed.

Solicitors for plaintiff: *Mercer & Mercer, for Mercer, Edwards, & Co., Deal.*

Solicitors for defendant: *Miller & Miller, for Savery & Chambers, Hastings.*

May 6.

THE MAYOR, &c., OF BRIGHTON *v.* THE GUARDIANS OF THE POOR OF BRIGHTON.

Limitations, Statutes of—Tenancy at Will—3 & 4 *Wm.* 4, *c.* 27, *s.* 7—37 & 38 *Vict. c.* 57.

In the year 1850, an Act (13 Vict. c. v.) was passed to enable commissioners (appointed by 6 Geo. 4, c. cxxix.) for managing the affairs of Brighton to purchase the Pavilion estate. By s. 19 of the Act, the commissioners were expressly prohibited from letting or selling any part of the property to be so acquired by them without the consent of the vestry. In 1854, the town of Brighton was incorporated, and in 1855 the powers and property of the commissioners under the Act of 6 Geo. 4 were transferred to the corporation. Down to the year 1853 the guardians of the poor of Brighton had had the use of offices in the Town Hall. On the 7th of March in that year they removed (by arrangement with the commissioners) to buildings which formed part of the Pavilion Estate, in the adaptation of which to their purposes they expended a considerable sum of money; and they continued in the exclusive occupation of their new offices,

without payment of rent or any acknowledgment of title in the commissioners or the corporation, down to the 19th of November, 1879, when an action was brought by the latter to recover possession :—

Held, that, inasmuch as the guardians had had the exclusive possession of the offices for more than twelve years (assuming their relation to the corporation to have been that of tenants at will), the claim of the coporation was barred by the Statute of Limitations, notwithstanding the prohibition against letting or selling without the consent of the vestry, contained in the local Act.

SPECIAL CASE. The plaintiffs claimed to recover possession of premises being part of the Pavilion property in Church Street, Brighton, now occupied by the defendants as offices, and for mesne profits.

By an Act of 6 Geo. 4, c. cxxix., passed in 1825, commissioners were appointed to manage and control the affairs of the town and parish of Brighton, and powers given for continuing the body by election.

By the same Act, powers were given for the inhabitants in vestry to elect directors and guardians of the poor for the parish at Easter in each year.

By s. 139 of the Act, the commissioners were impowered to erect a Town Hall, with such offices attached thereto as they should deem proper, for the purpose of holding their meetings in and for the convenience of the officers appointed by them, and for holding public meetings, and such other purposes as the commissioners should think proper. The Act directs when the meetings of the directors and guardians shall be held, but appoints no place for such meetings. Before the Town Hall was finished, the directors and guardians met at the Sea House Hotel, where the commissioners also met: but, after the Town Hall was completed, the directors and guardians met and had the use of offices in different portions of the Town Hall appropriated for that purpose: and this so continued until the year 1853.

By an Act of 13 Vict. c. v., passed in 1850, the commissioners were impowered to purchase, and did acquire by purchase in 1850, the Pavilion estate and grounds at Brighton.

By s. 18 of that Act a power was granted to the commissioners, subject to certain restrictions, of leasing land and houses to be purchased by them and not required for purposes of the Act.

By s. 19, "notwithstanding anything hereinbefore contained, it

1880

MAYOR OF BRIGHTON v. GUARDIANS OF BRIGHTON.

shall be lawful for the said Brighton town commissioners to sell and dispose of the ground, buildings, premises or property purchased or acquired under or by virtue of this Act, or any part or parts thereof, either together or in parcels, by public auction, with power to buy in the same at any auction, and re-sell the same at any subsequent auction, to such person or persons as shall be willing to purchase the same, and subject to such special or other conditions as to title or otherwise as shall be thought fit, and to convey and assure the property so sold accordingly; and that all and every the provisions in the said Brighton Town Act contained (other than the provisions therein contained for offering premises to the owners of land adjoining before sale thereof as therein mentioned, and which shall not extend to this present Act) with reference to the sale and disposal of property held thereunder, shall, so far as the same may be necessary or expedient for carrying the provisions of this Act into effect and be applicable hereto, apply and extend to this Act and the purposes hereof, in the same manner in all respects as if such provisions were herein repeated and made expressly applicable hereto: Provided, nevertheless, that no such sale as hereinbefore authorized shall be made or take place without the consent of the inhabitants of the parish of Brighton in vestry assembled first had and obtained thereto."

In 1854 the town of Brighton was incorporated; and by stat. 18 Vict. c. vi., passed in 1855, the powers of the said commissioners, and their property, were transferred to the corporation.

From 1841 to the 19th of May, 1852, frequent communications passed between the commissioners and the said directors and guardians respecting increased accommodation for the latter at the Town Hall.

In 1852 it was proposed that the offices of the guardians should be removed from the Town Hall to a portion of the Pavilion estate, and after several conferences between committees appointed by the commissioners and guardians respectively, the commissioners, on May 5, 1852, passed a resolution that the directors and guardians be permitted to use as offices and board-rooms a portion of the Pavilion estate fronting to Church Street,—the guardians making such arrangement in the rooms as they might find requisite, so that no alteration be made in the external arrangement or

form of the external buildings; and that the offices of the directors and guardians be removed from the Town Hall to the Pavilion accordingly.

The guardians accepted the offer of the commissioners, and removed their offices to the said portion of the Pavilion estate; they made alterations therein to render it suitable for their use as offices; and, from the 7th of March, 1853, till the present time, the guardians have used the premises as their offices. On the 16th of March, 1853, at a general meeting of the commissioners, the clerk reported that the offices of the directors and guardians had been removed from the Town Hall to the new parochial offices in Church Street, part of the Pavilion estate.

On the 19th of March and on the 8th of September, 1863, the plaintiffs wrote, by their town-clerk, to the clerk to the guardians letters, asking for an acknowledgment in writing that the directors and guardians held the premises from the corporation on sufferance.

No answer appears to have been made to such letters; but the plaintiffs received from the defendants a letter in answer to a subsequent application made on the 29th of March, 1865, to the effect that, the directors and guardians having accepted the offer of the commissioners on the understanding that the premises should be set apart for the permanent use of the board, and, secondly, that the poor law board having been induced to sanction the outlay for the conversion of the premises into offices for parochial purposes on that understanding, the directors and guardians declined under such circumstances to give an acknowledgment in writing that they held the premises from the corporation on sufferance.

The plaintiffs did not then press further for the acknowledgment requested in their letter.

In the year 1871, by virtue of an order of the local government board the designation of the directors and guardians became as follows,—"The Guardians of the Poor of the Parish of Brighton;" and they have since been known by that designation.

Until 1878, the property of the plaintiffs was not assessed to the poor-rate: but in 1878 the overseers of the poor of the parish assessed the Pavilion, Town Hall, and other property of the

1880

MAYOR OF BRIGHTON v. GUARDIANS OF BRIGHTON.

plaintiffs, and charged the same with the new poor-rate made on the 28th of March, 1878. The plaintiffs by their town-clerk thereupon wrote and sent to the defendants a letter asking them to pay a fixed rent for the parochial offices, and also contribute to the borough general district and Pavilion rates in respect of the workhouse and other parochial property within the borough.

The guardians replied offering to contribute to the rates, but declining to pay rent in respect of the parochial offices.

On the 19th of September, 1878, the plaintiffs served a notice on the defendants to quit the premises so occupied by them, being part of the Pavilion estate, and demanded possession of the same to be delivered up to them by the defendants. The defendants have refused to quit or deliver up possession to the plaintiffs.

No vestry meeting of the inhabitants of Brighton has been held upon the subject of any of the matters stated in this case under the Pavilion Act.

The question for the opinion of the Court is, whether, upon the facts above stated, the plaintiffs are entitled to recover possession of the premises from the defendants.

April 29. *Finlay*, for the plaintiffs. The defendants are not entitled to retain possession of the premises in question. The statute 13 Vict. c. v., s. 19, expressly prohibited the commissioners from parting with them; and the corporation of Brighton could not do what the commissioners were not allowed to do. The occupation of the guardians was not that of tenants at all; it was a mere permissive occupation, an occupation as licensees. To say that the arrangement between the guardians and the corporation was in the nature of a gift from the corporation, who had no power to alienate, would be absurd.

J. Brown, Q.C., for the defendants. It is not contended that the defendants acquired the premises by gift from the corporation: it may be conceded that the corporation had no right to alienate by gift or otherwise property vested in them for public purposes. But, the plaintiffs having been out of possession for twelve years, and the defendants in actual possession all that time, the Statutes of Limitation, 3 & 4 Wm. 4, c. 27, s. 7, and 37 & 38 Vict. c. 57, are a bar to the plaintiffs' claim. The legal effect of what passed

between the commissioners and the guardians in 1852, was, to create a tenancy at will; and the statute began to run from the expiration of the first year of such tenancy: *Doe* d. *Bennett* v. *Turner* (1); *Day* v. *Day* (2); *Magdalen Hospital Governors* v. *Knotts*. (3)

Finlay, in reply. There was no tenancy of any kind created here. In *Bertie* v. *Beaumont* (4), it was held that a servant put into the occupation of a cottage, with less wages on that account, did not become a tenant even at will. And see *Earl of Abergavenny* v. *Brace*. (5) The special Act upon which the question arises was posterior in point of date to the Statute of Limitations. An intention to evade the provisions of that Act is not to be imputed to the defendants.

[LOPES, J., referred to *Doe* d. *Hull* v. *Wood* (6), cited in Shelford on Real Property, 8th ed. p. 167.]

Cur. adv. vult.

May 6. The judgment of the Court (Denman and Lopes, JJ.), was delivered by

LOPES, J. This is a special case stated in an action of ejectment brought by the plaintiffs, to recover from the defendants possession of certain offices occupied by them in Church Street, in the parish of Brighton. The defence relied on is the Statute of Limitations; the plaintiffs contending that in the circumstances stated the statutory period of twelve years has not run, the defendants that it has.

Down to 1853 the defendants had the use of offices in the Town Hall, when they removed their offices to buildings forming part of the Pavilion estate, which had then become vested in the commissioners, appointed under an Act of 1825, pursuant to an Act of 1850 impowering them to purchase that estate, and spent large sums of money to render them fit for their use. The property of the commissioners was transferred to the plaintiffs in 1855, by statute, upon the incorporation of Brighton.

(1) 7 M. & W. 226.
(2) Law Rep. 3 P. C. 751.
(3) 8 Ch. D. 709; 4 App. Cas. 324.
(4) 16 East, 33.
(5) Law Rep. 7 Ex. 145.
(6) 14 M. & W. 682.

1880

MAYOR OF BRIGHTON v. GUARDIANS OF BRIGHTON.

From the 7th of March, 1853, until the bringing of this action (November, 1879), the defendants have had the exclusive use of these offices, and have paid no rent and given no acknowledgment in writing of the plaintiffs' title. In March, 1863, the plaintiffs wrote to the defendants asking for an acknowledgment in writing that they (the defendants) held the offices from the plaintiffs on sufferance; but the defendants refused to give such acknowledgment. The plaintiffs did not further press the matter; and nothing more was heard from the plaintiffs until 1878, when the plaintiffs were for the first time assessed to the poor-rate. The plaintiffs then demanded a fair sum by way of rent for the offices, which the defendants declined to pay. Eventually, on the 19th of November, 1879, the writ in this action was issued, to recover possession of the offices; and this case was stated for the opinion of the Court.

In these circumstances, we consider the plaintiffs have been out of possession for more than twelve years, and that they are barred by the Statute of Limitations.

It was contended that the defendants were mere licensees, and had no possession of the premises; the possession remaining in the plaintiffs. We cannot accede to that contention, and think that it is disproved by the facts. It is admitted that the defendants had the exclusive use of the offices, and that they never paid any rent, nor gave any acknowledgment in writing. How it can be said in these circumstances that the possession remained in the plaintiffs, we are at a loss to understand. In 1863, fearing no doubt the consequences which have since happened, the plaintiffs asked for an acknowledgment: it was refused: still they took no steps to defeat the operation of the statute until 1879.

It was also argued that s. 19 of 13 Vict. c. v., set out in the case, prevented the Statute of Limitations applying. It was said that the plaintiffs could not sell without the consent of the vestry, and therefore could not by neglect lose that which they could not alienate without the consent of the vestry. The case of *The Earl of Abergavenny* v. *Brace* (1) was cited. That case is distinguishable from this in every respect. There are found words in the

(1) Law Rep. 7 Ex. 145.

private Act apt to exclude the operation of any Statute of Limitations in existence when the Act was passed: *here* there are no words apt to exclude or capable of excluding the operation of the Act now in force. There, the estates were made in the first instance inalienable absolutely: here, an express power is given to sell with the consent of the vestry. There are no words in the 19th section which can control the effect of the Statute of Limitations, or can have any reference to the loss of an estate by a want of possession for a length of time.

Assuming that a tenancy at will existed at any time between the plaintiffs or the commissioners and the defendants, more than twelve years have elapsed during which no rent has been paid and no acknowledgment in writing has been given. Therefore s. 7 of 3 & 4 Wm. 4, c. 27, would apply, and the plaintiffs might have entered more than twelve years ago, if at all.

We think that the defendants, having been in possession ever since 1853 without payment of rent or acknowledgment in writing, are entitled to judgment.

Judgment for the defendants.

Solicitors for plaintiffs: *Tilleard, Godden, & Holme, for James A. Freeman, Brighton.*

Solicitor for defendants: *Somers Clarke, Brighton.*

1880
April 10.

BRETT AND ANOTHER *v.* CLOWSER AND BERRIDGE.

Right of Way—General Words descriptive of an Easement—Sale by Auction—Misrepresentation by Auctioneer (unauthorized but not wilful) as to the Existence of a Right of Way over adjoining Land.

10 Ch D 776
22 Ch D 180
11 Q B D 135

By indenture of lease of the 23rd of September, 1878, one Berridge demised to Brett a public-house at Hampstead, "together with all ways, waters, watercourses, drains, cellars, vaults, paths, passages, lights, easements, profits, privileges, commodities, advantages, and appurtenances whatsoever to the said premises belonging or in any wise appertaining." At the rear of the premises was a path across the garden to a doorway in the boundary wall which opened on to a private road (the property of Berridge) leading to Hampstead Heath.

On the 1st of October, 1878, Berridge (pursuant to an agreement of November, 1867) granted to the defendant Clowser a lease for ninety-nine years of land which comprised the private road leading from the back of the public-house to Hampstead Heath; and on the 9th of October in that year Clowser built up the doorway in the boundary wall. This way had, by special agreement between himself and his lessor Clowser, for several years been used by one Haughton, a former tenant of the public-house, whose tenancy had been determined in June, 1878:—

Held, that the way in question not being a way of necessity did not pass to Brett by the general words in the lease of September, 1878; and that the defendant Clowser was not estopped from denying the existence of the alleged right of way by having allowed Haughton to use it whilst he was the occupier of the public-house.

In August, 1878, the defendant Berridge offered for sale by public auction a lease of the public-house before mentioned. By the conditions of sale it was provided that "the lease to be granted shall contain the covenants, clauses, and provisions, and be in the form or to the effect set forth in the draft lease which will be produced on the sale and may be seen at the office of the auctioneers for seven days previous to the day of sale," and that "the property is presumed to be correctly described; but, as the premises may be viewed and the draft lease inspected at the office of the auctioneers, the purchaser shall be deemed to have bought with full knowledge of the contents thereof; and no error, misdescription, or omission in the particulars shall annul the sale, and no compensation shall be required for any such error, misdescription, or omission." There was no reference either in the conditions of sale or in the draft lease to the existence of any right of way from the garden of the public-house to Hampstead Heath; but, at the time of the sale, the auctioneer bonâ fide, but without any authority from Berridge, and acting entirely upon an inference drawn by himself from the appearance of the premises, and believing that there was a right of way through the same and over the private road and so to Hampstead Heath, stated publicly that there was such a way, and spoke of it as enhancing the value of the premises:—

Held, that the evidence of what passed at the time of the sale was admissible

as against the vendor; but that no action could after the completion of the purchase be maintained against him to recover compensation for this innocent misrepresentation by the auctioneer.

1880

BRETT v. CLOWSER.

ACTION against the defendant Clowser claiming damages for trespass to his premises The Hare and Hounds, Hampstead, and for obstruction of a right of way belonging to the premises, and also an injunction; and against the defendant Berridge claiming damages for breach of covenant for quiet enjoyment, and misrepresentation as to the existence of a right of way. The facts proved at the trial, and the nature of the arguments, are fully referred to in the judgment.

The case was argued before Denman, J., on further consideration on the 6th and 13th of March last, by *Day*, *Q.C.*, and *Finlay*, for the plaintiffs, by *Cohen*, *Q.C.*, and *Trevelyan*, for the defendant Clowser, and by *Webster*, *Q.C.*, and *Gould*, for the defendant Berridge.

The following authorities were referred to by the several counsel: —*Morris* v. *Edgington* (1), *Watts* v. *Kelson* (2), *Kay* v. *Oxley* (3), *Langley* v. *Hammond* (4), *Barlow* v. *Rhodes* (5), *Pearson* v. *Spencer* (6), *Plant* v. *James* (7), *Hart* v. *Swaine* (8), *Reese River Silver Mining Co.* v. *Smith* (9), *Slim* v. *Croucher* (10), *Rawlins* v. *Webber* (11), *Powell* v. *Edmunds* (12), *Higginson* v. *Clowes* (13), *Barwick* v. *English and Irish Joint Stock Bank* (14), *Jenkinson* v. *Pepys* (15), *Jones* v. *Edney* (16), *Cornfoot* v. *Fowke* (17), *Udell* v. *Atherton* (18), *Swift* v. *Jewsbury* (19), *Rawlins* v. *Wickham* (20), *Hart* v. *Swaine* (21), *Eaglesfield* v. *Marquis of Londonderry* (22), Addison on Contracts, 48, 49; Dart's Vendors, 5th ed. 110, 111; Williams on Real Property, 316, 317.

Cur. adv. vult.

(1) 3 Taunt. 24.
(2) Law Rep. 6 Ch. 166.
(3) Law Rep. 10 Q. B. 360.
(4) Law Rep. 3 Ex. 161.
(5) 1 C. & M. 439, 448.
(6) 1 B. & S. 571.
(7) 5 B. & Ad. 791.
(8) 7 Ch. D. 42.
(9) Law Rep. 4 H. L. 64.
(10) 1 De. G. F. & J. 518.
(11) 1 De. G. F. & J. 304.
(12) 12 East, 6.
(13) 15 Ves. 521.
(14) Law Rep. 2 Ex. 259.
(15) 6 Ves. 330.
(16) 3 Camp. 285.
(17) 6 M. & W. 358.
(18) 7 H. & N. 170; 30 L. J. (Ex.) 337.
(19) Law Rep. 9 Q. B. 301.
(20) 3 De G. & J. 304.
(21) 7 Ch. D. 42.
(22) 4 Ch. D. 693.

1880

BRETT v. CLOWSER.

April 10. DENMAN, J., delivered judgment. This was an action originally brought by the plaintiffs against Clowser only; but in the course of the proceedings Berridge was added as a defendant. The claim against Clowser was, first, for a trespass not now in dispute (40*l.* having been paid in and admitted to be sufficient damages so far as the trespass was concerned), and, secondly, for the obstruction of a right of way claimed by the plaintiffs over premises of the defendant Clowser. The claim against Berridge was an alternative one, in case the claim of a way against Clowser should not be established. It complained first of a breach of covenant for quiet enjoyment in a lease from Berridge to Brett, and, secondly, claimed damages in respect of a statement of the auctioneer, who sold the lease of the premises to Brett, that there was a right of way from the premises over Clowser's land to Hampstead Heath, upon the faith of which statement it was alleged that the plaintiff had bought the lease at a higher rate than he otherwise would have done, and so sustained damage. The plaintiff Pether was tenant in possession under Brett.

The case came on for trial before me and a special jury: but after certain facts had been proved and admitted, it was agreed that the jury should be discharged, and that I should decide as between Clowser and the plaintiff whether there was a right of way as alleged; and, if I should decide that there was no such right, then I was to determine whether Berridge was liable. A counter-claim pleaded was by consent struck out.

I adjourned the case for further consideration, and it was afterwards argued before me; it being agreed between all the parties that I should decide all questions of law and fact upon the evidence given, and that neither party should be at liberty to give any further evidence.

The facts proved were as follows:—The defendant Berridge was owner in fee of property at Hampstead. A portion of this property consisted of a public-house called the Hare and Hounds and its gardens and stables. The Hare and Hounds abutted on the west upon the highway from Hendon to London. It was in 1867 bounded on the north and east by some land in the occupation of a Mrs. Bowman and by other portions of Berridge's land.

A portion of the premises was up to 1867 used as a tea-garden; and this portion abutted upon another garden in the occupation of Mrs. Bowman. At that time there was no access from the Hendon and London road to the land of the defendant Berridge to the east of Mrs. Bowman's land. In the year 1867 one Haughton was tenant to Berridge of the Hare and Hounds, including the tea-garden up to Mrs. Bowman's land, under a lease of the 11th of August, 1857, for twenty-one years from the 29th of September following, with a power of re-entry for breach of covenants. The defendant Clowser in 1867 held the land adjoining Mrs. Bowman's land on the east, and adjoining the premises of the Hare and Hounds to the north and east. Clowser held under an agreement with Berridge (dated the 29th of November, 1867) for a lease of ninety-nine years, in which agreement it was provided that he was to make a path over that portion of the land belonging to the Hare and Hounds, then tea-gardens, and adjoining Mrs. Bowman's land, to give access to the Hendon road from buildings to be erected by him on the land to the east of such portion. No lease was granted to Clowser until the 1st of October, 1878, which was after that upon which the plaintiff relied. The plan referred to in the agreement of November, 1867, shewed that the contemplated lease from Berridge to Clowser was of land to be built on by Clowser, and which was to have an access to the Hendon road over the tea-gardens belonging to the Hare and Hounds, by a path which Clowser was to keep up. Clowser, in order to obtain this access entered into an arrangement with Haughton, the then tenant of the Hare and Hounds (which was reduced to writing and acted upon, though not signed), that part of the tea-gardens of the Hare and Hounds should be taken from Haughton's holding and used as a way from the Hendon road to a private road in front of the cottages to be built on Clowser's land, and so on to the heath; and that, in exchange for the portion of tea-gardens so to be given up by Haughton, a plot of ground at the back of the Hare and Hounds should be added to the back garden of the Hare and Hounds, and that a doorway should be made by Clowser in the wall surrounding such plot (which was done); and that Haughton should have access to the heath by such doorway and along Clowser's private road.

1880

BRETT v. CLOWSER.

All the above arrangements between Clowser and Haughton, including the right of way in question, were by the agreement between those parties limited to the term of the lease under which Haughton held the Hare and Hounds, which lease was for twenty-one years from September the 29th, 1857, but which in fact expired by forfeiture and ejectment in June, 1878. A sum of 20*l.* was paid by Clowser to Haughton in respect of the exchange, and Clowser built a wall round the piece of ground added to the Hare and Hounds' back premises, and made the doorway for blocking up which this action was brought.

The way in dispute was used by the occupants and customers of the Hare and Hounds when they required it, from 1867 down to the ejectment in June, 1878, and the door was there at the time of the lease to the plaintiff on the 23rd of September, 1878.

Judgment in ejectment and possession having been given to Berridge in June, 1878, he proceeded to put the premises up to auction; and on the 21st of August, 1878, the plaintiff Brett became the purchaser. On the 23rd of September, 1878, the lease under which he claimed the right of way was executed. That lease was for sixty years from the 29th of September, 1878, in consideration of a premium of 630*l.* and a rent of 60*l.* per annum. The description of the premises conveyed was as follows:—"All that public-house known by the name of the Hare and Hounds, on the east side of the high road, &c., Together with the garden adjoining and thereto belonging, the ground-plot of which premises is with the dimensions and abuttals thereof described and delineated in the margin, Together with all *ways*, waters, watercourses, drains, cellars, vaults, *paths*, *passages*, lights, *easements*, profits, privileges, commodities, advantages, and appurtenances whatsoever to the said premises belonging or in any wise appertaining." The lease also contained the usual covenant for quiet enjoyment. The plan upon this lease shewed the configuration of the land conveyed, with the measurements and the abuttals. There was no opening on the plan shewing the place of the doorway from the back garden. The roadway over the former tea-gardens was outside of the northern boundary of the land leased, and was marked "Private roadway to Wildwood Grove," and was not included in the land demised. Wildwood Grove was the name

of a row of houses built by Clowser between 1867 and 1878 on the land agreed to be demised to him by Berridge in 1867, and actually demised on the 1st of October, 1878. The plan on the plaintiffs' lease did include the portion added to the back garden of the Hare and Hounds in pursuance of the arrangement between Clowser and Haughton in 1867.

On the 1st of October, 1878, Berridge granted a lease to Clowser, as from June, 1867, of, amongst other things, the land upon which a roadway had been formed partly on the ground taken from the tea-gardens of the Hare and Hounds, and not including that portion of land occupied by Haughton as garden at the back of the Hare and Hounds. The plan upon Clowser's lease of the 1st of October, 1878, contained no indication of the opening from the plaintiffs' garden into the way leading to Hendon road towards the west and to Hampstead Heath towards the east; nor was there any reservation of such right in the lease, which conveyed the whole soil of the road along its whole length from Hampstead Heath to the Hendon road to Clowser.

The plaintiff contended, as against Clowser, who had blocked up the way opposite the doorway above described, that, upon the state of things which existed, he was entitled to a right of way from his back garden through the doorway erected in 1868 into the road conveyed to Clowser by the lease of the 1st of October, 1878, and so on to Hampstead Heath. The defendant Clowser denied that there was any right of way after the expiration of the lease to Haughton.

The plaintiff's counsel contended that, inasmuch as Clowser had throughout acted upon the terms of the exchange of 1867, and enjoyed the way into the Hendon road over the tea-gardens of the Hare and Hounds, and inasmuch as by Berridge's lease to Clowser in accordance with the original arrangement, that very piece of land was leased to Clowser on the 1st of October, 1878, he was estopped from denying the plaintiff's right of way, which formed part of the original consideration for the exchange, and therefore that Clowser had no right to obstruct it. But it appears, from a perusal of all the documents and plans which were put in evidence, that the whole arrangements as between Haughton and Clowser, including the right of way, were to hold good only during

1880

BRETT v. CLOWSER.

the intended term of the lease of August, 1867. That lease expired by forfeiture and ejectment in June, 1878; and, even if there had been no forfeiture, it would have expired by lapse of time on the 29th of September, 1878. The trespass complained of was not committed by Clowser until the 9th of October, 1878; so that, unless there was a fresh grant of the right of way by Berridge to Brett in the lease of the 23rd of September, 1878, it is impossible to say that Clowser would be liable for obstructing a way which he was bound to leave open over the land leased to him on the 1st of October, 1878, by Berridge. The question, then, must turn upon whether the lease of the 23rd of September contained any such words as to create anew such a right of way.

It was contended for the plaintiff that it did, because the way was an obvious one, passing through a made doorway and over a defined path, and being in actual use at the time at which the lease of the 23rd of September, 1878, was made; and a dictum of Bramwell, B., in the case of *Langley* v. *Hammond* (1) was strongly relied on. That, however, was a case in which the words of the deed in question were these,—"Together with all ways therewith" (i.e. with the premises) "now used, occupied, and enjoyed,"—words which render the dictum wholly inapplicable to the present case. The words of the lease to the plaintiff relied upon as conveying the right of way in question were the words "ways, paths, passages, easements, commodities, advantages, and appurtenances to the said premises belonging or in anywise appertaining." It was contended that the way in question passed under these general words: and the judgment of Lord Justice Mellish in *Watts* v. *Kelson* (2) was cited in support of that contention. Lord Justice Mellish there says: "We may also observe that in *Langley* v. *Hammond* (1) Baron Bramwell expressed an opinion, in which we concur, that, even in the case of a right of way, if there was a formed road made over the alleged servient tenement to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement *with the ordinary general words*." *Kay* v. *Oxley* (3) was also

(1) Law Rep. 3 Ex. at p. 171. (2) Law Rep. 6 Ch. App. at p. 174.
(3) Law Rep. 10 Q. B. 360.

relied upon, in which Lush, J., speaks approvingly of the view taken by Bramwell, B., in *Langley* v. *Hammond*. (1) But, in all these cases, the "general words" found in the conveyance which were relied upon were words descriptive of the easements in question, as, "with the premises now occupied or enjoyed," and are therefore no authorities for the plaintiff in the present case, which falls within the doctrine laid down in *Worthington* v. *Gimson* (2), *Pearson* v. *Spencer* (3), and *Wheeldon* v. *Burrowes* (4), that, except in the case of a way of necessity, in the absence of any reservation, no right to use ways which have been used and enjoyed in fact passes to a grantee of the land, unless there be something in the conveyance to shew an intention to create the right to use the way de novo. In the present case I can see nothing of the kind. The words used do not describe all ways actually used at the time of the conveyance or previously; they are no more descriptive of any particular existing ways than were the general words held to be ineffectual to create a right of way or other easement in the case of *Worthington* v. *Gimson*. (2) It is true that in that case the words "easements and appurtenances thereto belonging" were the only words used: but I do not think that the mere use of the words "ways, paths, and passages," in addition to the mere general words "easements and appurtenances," will justify me in holding that the conveyance to Brett shews such a clear intention to convey the way in question as to amount to a grant of the right of way which existed, *as between Clowser and Haughton, by special agreement only*, down to a period which had elapsed at the time of the conveyance from Berridge to Brett; nor do I think that Berridge could at that time have had power to create such a right as against Clowser, there being no provision made for it in the agreement for a lease in 1867, upon the faith of which Clowser was building upon the land ultimately demised to him in 1878. So far as the plan upon the deed is concerned, it does not support such a contention, though it may be that it contains no clear proof to the contrary, being a mere block plan of the premises intended to be conveyed. Moreover the user after Haughton's tenancy came to an

(1) Law Rep. 3 Ex. 171.
(2) 2 E. & E. 618; 29 L. J. (Q.B.) 116.
6 Jur N.S. 1053.
(3) 1 B. & S. 571. 7 Jur N.S. 1195
(4) 12 Ch. D. 31.

1880

BRETT v. CLOWSER.

end would not in my opinion be enough to establish the claim, even if the words "now used and occupied therewith" had been contained in the deed; for, there is no evidence that after Haughton was ejected, any user of the way at all took place. The user, such as it was, was throughout one in accordance with the arrangement between Haughton and Clowser,—a user for a limited period which had expired before the plaintiff became the purchaser of the premises. I feel bound, therefore, to hold that no right of way over Clowser's land passed to the plaintiff Brett by the deed of the 23rd of September, 1878, and that Clowser is entitled to my judgment, with costs as against the plaintiffs.

This brings me to consider the other branch of the action, which is in fact a separate action against Berridge.

It appeared that, upon the land being delivered to the defendant Berridge upon the judgment in ejectment in June, 1878, he proceeded to put the premises up to sale. The auctioneer employed was one M'Laren. Particulars and conditions of sale were prepared, which were indorsed "Particulars and conditions of sale of the lease, with immediate possession, of the Hare and Hounds wine and spirit establishment, situate on the main road to Hendon, and being in close proximity to the Bull and Bush and Jack Straw's Castle." The particulars merely stated the number of rooms, the existence of stables and garden, and that the premises were admirably arranged for carrying on a large and increased trade, being a most healthful resort, and in close proximity to the Bull and Bush and Jack Straw's Castle. The only paragraphs of the conditions of sale necessary to be mentioned were the 4th, which provided that the lease to be granted "shall contain the covenants, clauses, and provisions, and be in the form or to the effect set forth in the draft lease which will be produced on the sale, and may be seen at the office of the auctioneers for seven days previous to the day of sale," and the last, which was as follows:—"The property is presumed to be correctly described: but, as the premises may be viewed and the draft lease inspected at the office of the auctioneers, the purchaser shall be deemed to have bought with full knowledge of the contents thereof; and no error, misdescription, or omission in the particulars shall annul

the sale, and no compensation shall be required for any such error, misdescription, or omission."

The property was put up to auction on the 21st of August, 1878. At the sale, the auctioneer bonâ fide, but without any authority from Berridge, and acting entirely upon an inference drawn by himself from the appearance of the premises, and his own user and observation of the doorway in question in Haughton's time, and believing that there was a right of way through the door in question and over the land marked as "Private road to Wildwood Grove," and so to Hampstead Heath, stated at the auction that there was such a way, and spoke of it as enhancing the value of the premises, which he said it in fact would do. This evidence was objected to at the trial; and the first question is whether it was admissible or not.

The counsel for Berridge relied upon *Powell* v. *Edmunds* (1) in support of his objection. That, however, was a case in which the evidence sought to be admitted was evidence of a warranty by the auctioneer that the timber contained in one of the lots for sale amounted to a certain weight: and the evidence was rejected, on the ground only that the warranty would alter the agreement, which it undoubtedly would have done. In the present case, the action being based upon a representation said to be collateral to the contract disclosed upon the conditions of sale, it was contended that the evidence was admissible; and the passage from Lord Ellenborough's judgment in *Powell* v. *Edmunds* (1) was relied upon, in which he says,—"The only question which could be made is, whether if by a collateral representation a party be induced to enter into a written agreement different from such representation, he may not have an action on the case for the fraud practised to lay asleep his prudence." Of course, if the evidence in question was inadmissible, the plaintiffs' case as against Berridge is at an end; for, it is founded entirely upon this evidence. I think, however, it was admissible.

There is no reference at all in the conditions of sale or in the draft lease referred to therein which would give any information to the purchaser, from which he could tell whether a right of way existed from the back garden of the Hare and Hounds to

(1) 12 East, 6.

1880

BRETT v. CLOWSER.

Hampstead Heath or not. The plan gave no information on the point. I think, therefore, that, in an action founded upon an allegation that the plaintiff was damnified by being induced to make a bad bargain by a misrepresentation of the auctioneer as to the existence of such a way, the evidence was admissible whether it did or did not suffice to make out a case against Berridge. Then the question is, whether, such a statement having been inaccurately and bonâ fide made by the auctioneer without any authority from Berridge, and the plaintiff having been thereby induced to give a larger price for the premises than he would otherwise have given, an action can be maintained against Berridge for compensation. It was contended that it would, in very able arguments by Mr. Day and Mr. Finlay, for the plaintiffs, on the principle enunciated in several cases, that a man has no right to retain the benefit of a contract obtained by even the innocent misrepresentation of himself or his agent, whereby the other party was induced to enter into a contract which he would not have entered into if the representation had not been made.

As a general principle, there can be no doubt that this doctrine has been strongly asserted and acted upon by very high legal authority; and, for myself, I may say that if I found no authority closely applicable to the present case, I do not see why such an action might not be supported as the present upon the facts proved. The auctioneer is a person having authority to sell for the best price he can get. He is a person who would be not unreasonably assumed by a bidder to have authority to state whether a doorway at the back of the premises was to be considered as indicating nothing or something of considerable value, that is, whether the passage through it led into a way over which there was a right of passage or not over the adjoining land. The bidder would be materially influenced by the auctioneer's statements, unless he happened to know that they were in law a matter of no importance, and that, if he does not take the precaution to have the right of way secured to him by the deed, he will have no remedy. But I am not at liberty to consider the question as if it were one upon which there is no authority.

The general doctrine laid down by the Courts of Equity is that

stated in Mr. Dart's law relating to Vendors and Purchasers, 3rd edit. p. 503, that "with some few special exceptions" (which do not here apply) "a purchaser, after the conveyance is executed by all necessary parties, has no remedy at law or in equity in respect of any defects either in the title to or in the quantity or quality of the estate." It is also laid down in Lord St. Leonards' Vendors and Purchasers, in p. 197 of the 13th edition, that "a bill cannot be filed for compensation, e.g. where the rental of the estate was represented higher than its actual amount," after the completion of the contract. The case of *Bos* v. *Helsham* (1), in which compensation was allowed after the completion of the conveyance, was so decided entirely on the ground that the conditions of sale provided for compensation (which was held to include compensation for a mistake discovered after conveyance) in that particular case: but the general doctrine was not impugned. The conditions of sale, which in that case were held to constitute one of the few special exceptions referred to by Mr. Dart in the passage above cited, were in the present case an additional difficulty in the plaintiffs' way; for, so far from contemplating compensation, they appear to be framed with the intention of excluding any claim for compensation on any ground, excepting, of course, the ground of fraud. In the case of *Legge* v. *Croker* (2), it was held that no compensation could be granted in a case where a lease had been deliberately executed making no mention of a right of way over the premises, though it turned out in fact that there was such a right of way, and though the lessor had more than once represented to the lessee that there was no such right of way, and though the heads of the intended agreement between the parties, including the statement that there was no such right of way, had been reduced to writing, but not signed by the parties before the lease was prepared. The Lord Chancellor (Lord Manners), giving judgment in that case, says,—"Then arises the question whether under the head of fraud or mistake, the defendant is bound to make good the injury the plaintiff has sustained by reason of the right of way being established, and, if he is, whether that is to be done by altogether rescinding the contract and cancelling the lease, or by making compensation by way of damage." "If it

(1) Law Rep. 2 Ex. 72. (2) 1 Ball. & B. 506.

1880

BRETT v. CLOWSER.

were a wilful misrepresentation, the plaintiff might be entitled to relief: but, where the parties have expressed their meaning by a lease that has been with due deliberation executed, and where there is no wilful misrepresentation, nor any mistake in omitting to introduce a covenant respecting his right of way into the deed, it would be very dangerous to correct this deed upon such slight grounds." Then, after stating the grounds upon which the defendant had made the statement in question, Lord Manners continues—"With this impression on his mind, the defendant represented to the plaintiff that there existed no right of way. He conceived himself to be in point of law justified in asserting this after the presentment by the grand jury, and to be warranted in point of fact when, after having erected gates, having directed his servants to prevent people passing, he found it acquiesced in for so many years. This cannot be called a misrepresentation; and, not being introduced into the draft or the lease, it constituted no part of the agreement." And he adds: "The case would have been materially different if wilful misrepresentation or omission had been made out. It is sufficient for me to say they form no part of the contract." This decision has been on more than one occasion cited with approval by the Courts of Equity in this country: see, for instance, *Manson* v. *Thacker* (1), per Malins, V.C.; who also, in the very recent case of *Allen* v. *Richardson* (2), after full consideration of all the cases on the subject, adhered to the same view. And it was relied upon as sound law by Lord Cottenham, L.C., and Lord Campbell, in their judgments in the case of *Wilde* v. *Gibson* (3), where it is spoken of by the latter learned Lord as the case shewing the proper limits of an action of the kind sought to be maintained in the present case. The case of *Wilde* v. *Gibson* (3) itself is severely attacked by Lord St. Leonards in his Treatise on the Law of Real Property, p. 660; and *Legge* v. *Croker* (4) does not escape his criticism: but I can find no decision in the Reports which overrules the doctrine there laid down, or which would authorize me in holding a vendor liable to compensation for a discovery, after the completion of the purchase, that a right of way honestly but mistakenly said by the auctioneer

(1) 7 Ch. D. 620, 624.
(2) 13 Ch. D. 524.
(3) 1 H. L. C. 626, 636.
(4) 1 Ball. & B. 506.

to belong to the premises, but not stipulated for by the purchaser, did not in fact exist. The case of *In re Turner and Skelton* (1) is, no doubt, not reconcilable with *Manson* v. *Thacker* (2) or *Allen* v. *Richardson* (3): but that was a case in which the misstatement relied upon was a misstatement in the agreement itself, and where the conditions provided for compensation in respect of misstatements. The same was the case in *Cann* v. *Cann* (4), which was relied upon by the Master of the Rolls in support of his view, in opposition to that of Malins, V.C., in the two cases recently decided by him and before referred to.

In the present case, the only misrepresentation relied on is an honest but perfectly unauthorized one, made by the auctioneer, and founded wholly upon a false inference of his own, drawn from his previous observations of the mode in which the property had been used before it reverted to his employer by the forfeiture of Haughton's lease. There was no intention on the part of the lessor to authorize the auctioneer to warrant the existence of the way, or to undertake to convey it as an existing way,—at least, no such intention is apparent, and it certainly cannot be presumed that he intended the auctioneer to make such a statement.

The cases in which misrepresentations have been held to afford a defence to a suit for specific performance, or even to entitle the purchaser to specific performance with compensation, or to entitle him to rescind the contract, do not conflict with the doctrine acted upon in *Legge* v. *Croker*. (5) That case appears to me to be identical with the present in principle; for, I can see no distinction between the inaccurate denial of the servitude in the one case, and the inaccurate assertion of the quasi-easement in the other.

The case of *Hart* v. *Swaine* (6) was the strongest case in favour of the plaintiffs which was cited on their behalf: but, in that case, the inaccuracy was one which appeared on the face of the contract: the land was described in the contract as freehold, and turned out to be copyhold, so that the purchaser had not got the thing which he bargained for. In the present case, the bargain was executed: the plaintiff had got all he stipulated for in his contract; and the compensation sought for is for the non-existence

(1) 13 Ch. D. 130.
(2) 7 Ch. D. 620.
(3) 13 Ch. D. 524.
(4) 3 Sim. 447.
(5) 1 Ball. & B. 506.
(6) 7 Ch. D. 42.

1880

BRETT v. CLOWSER.

of something which he had not taken the precaution to have inserted in the contract at all. I am of opinion, therefore, that I am not at liberty to hold the plaintiffs entitled to damages in respect of the representation of the auctioneer.

The claim for breach of covenant for quiet enjoyment of course fails, inasmuch as the way in question was not conveyed by the deed containing the covenant. I therefore give judgment for the defendant Berridge, with costs.

Judgment for the defendants accordingly.

Solicitor for plaintiffs: *W. H. Nicholls.*
Solicitors for defendant Clowser: *Berkeley & Calcott.*
Solicitors for defendant Berridge: *Hunters, Gwatkin, & Haynes.*

June 7.

[IN THE COURT OF APPEAL.]

THE DUKE OF NORFOLK *v.* THE REV. GEORGE ARBUTHNOT.

Grant—Collegiate Church—Chancel—Dedication—Dissolution of Ancient Monastic Priory—Surrender to the Crown—Re-grant—Light—Prescription—Prescription Act (2 & 3 *Wm.* 4, *c.* 71), *ss.* 3, 4—*Lost Grant.*

The monastic priory of Arundel was suppressed or dissolved in the reign of Richard II. (about the year 1380), and a college consisting of a master or warden, and twelve seculars or chaplains was by the King's licence created in its stead. The instrument of foundation contained rules or statutes for the government of the members of the college, and for the services to be celebrated "in ecclesiâ præfatâ."

The church of St. Nicolas Arundel, which architecturally considered, was one entire building, all apparently of the same date, was a "cross-church," with a nave and aisles; a central tower; transepts rather shorter than would be usual in a church of such proportions; and eastward of the central tower and transepts, a chapel (known as the Fitzalan Chapel) occupying the place commonly filled by the parish chancel; a north aisle called the Lady Chapel; and at the north-east corner a room originally a "sacristy," but which had for many years been used as a school room, and as a place where the elections to offices in the corporation of Arundel were habitually held.

In 1511, disputes having arisen between the college and the corporation of Arundel as to the repair of "ye crosse-partes" or transepts, the bell-tower of the church, the bells and bell-furniture therein, they were submitted for arbitration to the then Earl of Arundel and the then Bishop of Chichester. These "crosse-partes" were described as going from south to north "inter chorum et navem ecclesiæ;" and the award of the Earl and Bishop was as follows:—The college are solely to repair the south transept, "quæ cancellus parochialis vulgariter nuncupatur;" the corporation and the parish are solely to repair the north transept and the whole of the nave and its aisles; and the expense of keeping up and repairing the

bell-tower, bells, and bell-furniture is to be defrayed by the corporation and the parish on the one part, and the college on the other part, in equal moieties.

In the 26th year of Henry VIII. (1544) the master or warden and chaplains of the college surrendered to the King "totam cantariam sive collegium nostrum prædictum; ac etiam totum scitum, fundum, circuitum, ambitum, vel procinctum, ac ecclesiam, campanile, et cimiterium ejusdem cantariæ sive collegii, cum omnibus et omnimodis domibus, ædificiis, ortis, pomariis, gardinis, terrâ et solo infra dictum circuitum et procinctum cantariæ sive collegii prædicti, &c." In the same year the King in almost the same words granted the college and its possessions to Henry Earl of Arundel and his heirs, through whom the plaintiff claimed.

Since the surrender and re-grant of 1544 no act of religious worship had taken place nor had prayers been said within the walls of the Fitzalan Chapel, with the exception of reading the burial service of the Church of England over the bodies of members of the plaintiff's family which had been buried there; and during the whole of that time the plaintiff and his predecessors had claimed to exclude, and had in fact excluded, the vicar and parishioners of Arundel from the whole of the Fitzalan Chapel. An iron lattice-work or grille filling the arch which would be commonly called the "chancel arch," and which apparently was as old as the Fitzalan Chapel itself, and divided it from the rest of the structure, was locked on the eastern side (there being no key-hole on the other side), and the key was always kept by the plaintiff and his predecessors in title. Vaults had been made and interments had taken place both in the Fitzalan Chapel and in the Lady Chapel, at their sole pleasure. No faculty had ever been applied for, nor had any fees been paid in respect of such vaults and interments. Against these acts of ownership exercised by the plaintiff's predecessors during more than 300 years, there was not a single act of ownership proved on the part of either the vicar or the parishioners. The answers returned by successive churchwardens for a long series of years (from 1844 to 1875) to articles of visitation episcopal and archidiaconal, for the most part shewed that they assumed the south transept to be the chancel of the parochial church. In 1873 the plaintiff erected a wall across the west end of the Fitzalan Chapel: in 1877 the defendant, who was vicar of Arundel, pulled down part of it. There had been some correspondence as to the respective rights of the parties; but the plaintiff declined negotiation and claimed the Fitzalan Chapel as his property:—

Held, that these facts above stated shewed that the building in question was not the chancel of the parochial Church of St. Nicolas Arundel, but had always remained the property of the Duke of Norfolk and his predecessors, and that a legal origin for the plaintiff's claim must be presumed.

Held, further, that the defendant could not justify the pulling down part of the wall on the ground that he was entitled to the access of light from the Fitzalan Chapel into the parochial church: for such a claim could not be justified either by prescription at common law, under the Prescription Act (2 & 3 Wm. 4, c. 71) ss. 3, 4, or by virtue of a lost grant.

APPEAL of the defendant from the judgment of Lord Coleridge, C.J., in favour of the plaintiff. (1)

(1) 4 C. P. D. 290.

Scrutton cont. 6 ed. 279

1880

DUKE OF NORFOLK v. ARBUTHNOT.

The facts are stated in the report of the proceedings before Lord Coleridge, C.J., and in the judgments of the Lords Justices.

May 31; June 1, 2, 3. *A. Charles, Q.C.*, and *Jeune* (*Vicary Gibbs*, with them), for the defendant, contended first, that the disputed building was part of the parochial church: they cited 1 Phillimore on Ecclesiastical Law, p. 840; *Chapman* v. *Jones* (1); *Churton* v. *Frewen* (2); *Clifford* v. *Wicks* (3); *Reg.* v. *Twiss* (4); 1 Phillimore on Ecclesiastical Law, p. 279; 2 Inst. 489: secondly, that the defendant was entitled to an access of light from the disputed building into the church by prescription at common law, under the Prescription Act (2 & 3 Wm. 4, c. 71), and under a lost grant: they cited *Bennison* v. *Cartwright* (5); *Warrick* v. *Queen's College, Oxford* (6); *Glover* v. *Coleman* (7); Gale on Easements, p. 148; *Bright* v. *Walker* (8); *Griffin* v. *Dighton.* (9)

Sir J. Holker, Q.C., and *W. G. Phillimore*, were not called upon to argue for the plaintiff.

At the conclusion of the arguments upon behalf of the defendant, the following judgments were delivered as to the second question.

BRAMWELL, L.J. We will dispose of the question as to light and air at once. We are of opinion that the judgment of Lord Coleridge was perfectly right. I doubt whether the church could be considered a "building" within 2 & 3 Wm. 4, c. 71, s. 3. I doubt whether there can be in law an enjoyment of light through such an aperture as this arch, which exists for the common benefit of two buildings. I say two buildings, because the question which we are now considering supposes that the parochial church and the Fitzalan Chapel are distinct buildings. But I am clearly of opinion that there was a submission to interruption for more than a year within 2 & 3 Wm. 4, c. 71, s. 4, and that it is not possible for the defendant to make out any claim. The claim to the enjoyment of light by prescription at common law is not maintain-

(1) Law Rep. 4 Ex. 273.
(2) Law Rep. 2 Eq. 634.
(3) 1 B. & A. 498.
(4) Law Rep. 4 Q. B. 407.
(5) 5 B. & S. 1; 33 L. J. (Q.B.) 137.
(6) Law Rep. 10 Eq. 105.
(7) Law Rep. 10 C. P. 108.
(8) 1 C. M. & R. 211.
(9) 5 B. & S. 93.

able, for we know the whole truth, and we find that the defendant has not an immemorial title because the church and the chapel were built within the time of legal memory. I confess that if I had to adjudicate upon it, I should doubt very much whether there was any enjoyment as of right. The defendant has also relied upon a lost grant. I refuse to find that there was a grant which has been since lost; for I am quite certain that it never existed. The claim to light and air entirely fails, and so far the judgment of Lord Coleridge ought to be affirmed.

BAGGALLAY, L.J. I am of the same opinion, and I have nothing to add to what was said by Lord Coleridge at the conclusion of his judgment, and to what has just now been said by Bramwell, L.J.

BRETT, L.J. I am of the same opinion. I am quite sure that the claim to light and air cannot be maintained on the ground of immemorial prescription, because the date of the commencement of it is obviously within the time of legal memory. With regard to the claim under the Prescription Act (2 & 3 Wm. 4, c. 71), ss. 3, 4, I think that there was a submission or acquiescence; this case does not resemble either *Bennison* v. *Cartwright* (1), or *Glover* v. *Coleman*. (2) With regard to the claim under a lost grant there may be some difficulty owing to *Angus* v. *Dalton* (3), which is now before the House of Lords. As that case is under appeal, I may venture to say that I entirely maintain the opinion which I then expressed. But here the question is not whether there is any evidence of a lost grant. It may be that if this case had been tried before a jury, the judge would have been bound to leave to them the question whether they would find that a grant now lost had once existed. It seems to me that the question, whether a lost grant did once exist, is one of fact which must be considered by the tribunal which has to try the action, and that in the present case, if there was a grant to a predecessor of the defendant, there must have been another grant by the defendant's predecessor to one of the plaintiff's predecessors, because it is

(1) 5 P. & S. 1; 33 L. J. (Q.B.) 137. (2) Law Rep. 10 C. P. 108.
(3) 4 Q. B. D. 162.

1880

DUKE OF NORFOLK v. ARBUTHNOT.

impossible to say that the light was to come from the chapel or chancel into the church, and that the chapel or chancel was not to have light from the church. It seems to me ridiculous to suppose that there was a grant of the light through this aperture. As a matter of fact I am quite sure that there never was a grant of the right to light which has since been lost.

THE COURT intimated that they would take time to consider whether they should hear the plaintiff's counsel upon the other questions raised in the case.

June 7. The following judgments were delivered:—

BRAMWELL, L.J. I am of opinion that this judgment must be affirmed. Of course it ought to be affirmed, unless we are reasonably satisfied that Lord Coleridge was wrong. I am not satisfied that he was wrong; and I feel very much inclined to say nothing more, for I cannot help thinking that a case of this description, after the elaborate manner in which it was argued before him, might reasonably have stopped and have gone no further. However, the parties have brought it before us, and, I suppose, are entitled to a more full expression of opinion than I have yet given as to the reasons and grounds of our judgment.

The view, which ought to be taken of this case, seems to me to be this: There is at Arundel a building which, except that a part is now out of repair, has to the eye the appearance of being a single structure, built at one time, and probably with a view to its use as a whole. Without pretending to any knowledge upon the subject, I may say that it is an ordinary cruciform church, a church with a nave and aisles, with transepts, and with a chancel; and I suppose that if any one had looked at the church before the process of decay had commenced, he would have been of opinion that it was one building, and if he had been told that a part of it was a parish church, he would have said that the whole of it was a parish church. That seems to me the conclusion that any one would have drawn from the appearance of the building, from its character, and the nature of the structure. I think also that if any one had read the various documents of grant and endowment (with one exception to which I will presently advert),

he would have thought that they were speaking of one church, of one building, and not of a building which from its origin was divided into two in point of right and in point of use, or at least in point of the power of user: the documents (with the exception which I have mentioned) would rather lead any person to the conclusion that the building was intended to be what it has the appearance of being, namely, one building used for one purpose, and consequently, that if part of it was a parish church, the whole of it was a parish church. But the questions with which we have to deal are not limited to the mere appearance of the building nor to the documents relating to its foundation: on the contrary, a great deal of convincing evidence is to be found in the circumstance, that from the time of the dissolution of the college, and of the surrender to King Henry VIII., down to the present time, the process of decay and desolation has been going on for centuries. This was conceded by the defendant's counsel. From the time of the cesser of the college and its surrender, the so-called chancel has been shut up, and has been disused except for the purpose of the occasional burials of those connected with the plaintiff's family, or with those whom he has succeeded. There has been an entire discontinuance of user of that building by every one except the plaintiff and his predecessors; the plaintiff has not used it much; he has allowed it to go into decay, and no one has repaired it or sought to repair it; but so far as it could be put to any use, for instance, for the purpose of storing scaffold poles and other things, it is the plaintiff who has used it. Now what possible explanation can there be of this condition of things, except that the plaintiff is the owner of the church? If this was truly a part of the parish church, how could the parishioners have permitted this state of decay to go on? It appears to me that I might almost stop here and say that these circumstances can be explained in only one way; and that the explanation is that the chancel never formed part of the parish church, although the whole structure is but one in its character. I may say at once that if I had thought that the chancel at one time had formed part of the parish church, it would do so still, and the plaintiff would have no right to it; because no evidence has been given to shew that what once formed part of the parish church has ceased to be so. But it is

1880

DUKE OF NORFOLK v. ARBUTHNOT.

Bramwell, L.J.

unintelligible to my mind that 300 or 350 years ago, the chancel could have formed part of the parish church, and yet that the parishioners should have permitted it to be dealt with in the way in which it has been. I do not think that in the many thousands of parishes in England one instance can be cited, in which such a state of things can be suggested as having existed. What other considerations present themselves in this case? We find that there was a college, and it is manifest from the structure, as well as from the statutes, that the members of that college were to perform certain duties, functions, and ceremonies, and to offer certain prayers. No doubt they were to perform these offices in the chancel: there were therefore two different sets of persons interested in the church, namely, the parishioners and the college; and there was nothing to prevent any pious or benevolent person from rebuilding the church in such a manner that it should be architecturally and structurally one building, yet that a portion of the building should be the parish church in substitution for the old parish church, and perhaps occupying its very site, and that the other part should be the peculiar and special property of the college: he might think, reasonably enough, that it would be convenient that the place where the members of this college should perform their services should not be where the chaplains live; that it would be convenient that that place should adjoin the parish church, but that it should be their special property, and that they should be under no obligations to keep it open as a parish church, and that it should not be part of the parish church. There is no reason in point of law why such a scheme should not be carried out: none has been suggested by the defendant's counsel, and no authority has been produced. It has been alleged that a bishop would be unwilling to consecrate a church of such a kind as I have mentioned; but I think it a bold thing to contend that a bishop might not have done so some centuries ago: there is no antecedent improbability of fact that it might be done. I am confirmed in this view by the character of the grille. When the grille is closed, the chancel is as completely separate from the nave, the aisles, and the transepts, as though a wall had intervened between them, except that the grille, as its very name indicates, is not closed entirely, but there is a sort of net work so that there

are spaces through which one building may be seen from the other. The peculiarity is such, that the owners of the chancel, if they were different from the parishioners, might hold it as a separate property from that to which the latter were entitled; for the owners of the chancel could shut it off from the rest of the church as completely as if a wall had been there built. There is moreover an antecedent cause for the existence of that state of things which the plaintiff contends did exist; if there were not two buildings, but two portions of one building severally owned, the members of the college for the more solemn and dignified mode of performing the services might have permitted the building belonging to them to be used as the chancel of the church: so that the high altar would be at the eastern end of this chancel, the choir would sit in the seats appropriated to them, and the congregation would sit in the nave. This hypothesis accounts for the condition of things, which we know has happened. For several centuries this chancel has been wholly disused by the parishioners, and so far as it has been used at all, it has been used by the plaintiff and his predecessors, and those who claimed through them. I will now mention the award made in 1511. The award does undoubtedly speak of the building as one, but it shews that there was a place which was commonly called the parochial chancel: this would almost of itself convince me that although the chapel of the college might have been popularly called the chancel, although to the eye it was a chancel or choir, although it was from time to time used as it would have been if it had been the chancel, it was then commonly believed not to be the chancel of the church, and it was generally thought that the parochial chancel was elsewhere. This alone is a strong piece of evidence for the plaintiff; but when I consider this in conjunction with the other circumstances of the case, I am left without a doubt that this apparently one building was in truth two.

I have not forgotten a piece of evidence as to user, which, I confess, is favourable to the defendant's contention, and that is the burials of members of the family of the Dukes of Norfolk in the chancel with the rites of the Church of England. I own that it is difficult to understand how that has happened. Lord Coleridge

1880

DUKE OF NORFOLK v. ARBUTHNOT.

Bramwell, L.J.

in his judgment (1) says the Church of England service is not objected to by the old Roman Catholic families. Nevertheless, it seems to me a little strange, because, although Roman Catholics may not object to the burial service of the Church of England, they would naturally prefer to use their own ceremonies. I cannot help thinking that the practice may have had its origin in some notion on the part of the plaintiff's predecessors in title that, without the assent in some form or another of the vicar of the parish, they could not lawfully have claimed a right to be buried in the chancel. However this may be, it is a small circumstance compared with other matters; and when I review the other circumstances which I have mentioned, I come to the conclusion, with a very great deal of confidence, that the so-called chancel was never part of the parish church, but has always been the separate property of the college and of the King, to whom the college surrendered it, and of the predecessors in title of the plaintiff, who claim under the King's grant, and that consequently the plaintiff is entitled to recover in this action, and that the judgment of Lord Coleridge should be affirmed.

BAGGALLAY, L.J. I am of the same opinion. I do not propose to discuss the circumstances of the case in any detail, for the documentary evidence has been carefully examined and the undisputed facts have been fully considered by Lord Coleridge, and I agree in substance with his criticisms. I desire, however, to express the general grounds upon which I have come to the conclusion that this appeal should be dismissed.

At the end of the fourteenth century, in the reign of King Richard II., an ecclesiastical building was erected in the town of Arundel. Regarded from an architectural point of view, it was a cruciform church, with nave, aisles, a central tower, transepts and chancel. It had an altar at the east end of the chancel, other altars in different parts of the building, including one on the east side of the south transept, a Lady Chapel on the north side of the chancel, and a rood loft across the chancel arch. With one exception, to which I will presently allude, this building was, in its general arrangement, a complete church, and well adapted for

(1) 4 C. P. D. 290, at p. 307.

the performance of the several sacred offices, which, at the period of its erection, were usually performed in a parish church. It moreover stood, wholly or in part, upon the site of a previously existing church dedicated to St. Nicolas, and which is recognised or referred to as the parish church of St. Nicolas Arundel in the ancient documents which have been the subject of comment by the counsel for the appellant. There is, however, no evidence as to the precise boundaries of such previously existing church. I may here mention that shortly after the Norman conquest a priory of monks of the Benedictine Order were established in Arundel, and acquired the rectory of the parish and the rights incident thereto; and some time previously to the erection of the church, but at what time in particular does not appear, a vicarage had been erected, of which the priory were the patrons. The question which we have to determine on the present appeal is, whether the chancel of the church which was so erected in the reign of Richard II. became part of the parish church of Arundel. The appellant, who is the present vicar of Arundel, contends that it was part of the parish church at the time of its construction, and has ever since continued to be so. On the other hand, the Duke of Norfolk, who is the respondent, insists that the building in question was not at any time part of the parish church, but has at all times been the property of himself and his predecessors in title. As a matter of convenience, I shall refer to the church so erected as "the church," and to the building in question as "the chancel."

In considering the general question thus submitted to us, the the first inquiry which suggests itself is, in what manner has this chancel been treated and used since the time of its construction? Have the sacred offices been performed in it, which for the time being were usually performed in a parish church? Have the vicars for the time being exercised any authority or control over it? Has its state or condition been inquired into upon the occasion of episcopal or archidiaconal visitation? Has it been kept in repair by those who for the time being would be by law bound to repair it, if it was the chancel of a parish church? All these and other questions of a similar nature have been fully and carefully considered by Lord Coleridge in his judgment, and I do

1880

DUKE OF NORFOLK v. ARBUTHNOT.

Baggallay L.J.

not propose to refer to them further than to say that they must, in my opinion, be answered in the negative, and for the reasons assigned by him the conclusion to be drawn from these questions being so answered is very adverse to the view put forward by the appellant. On the other hand there is the strongest evidence of acts of apparent ownership on the part of the predecessors of the present respondent. At the same time I fully assent to the argument pressed upon us by the appellant's counsel that if it is established that the chancel ever formed part of the parish church, in the sense contended for by him, the mere fact of its disuse, even during four or five centuries, would not be sufficient to deprive it of its ecclesiastical character, or the vicar of his rights as such to minister within it. To return, however, to the period of the erection of the church, one portion of it was admittedly constructed in a manner very unusual in churches built at this, or indeed at any other period; across the chancel arch there was an iron lattice or grille separating the nave from the chancel, which lattice or grille, when the gates in it were closed, prevented the access from the nave to the chancel, or vice versa. No instance has been brought to our attention of a similar grille having formed part of the original construction of any other church, and the fact of its being introduced into the church at Arundel is at least suggestive of an intention on the part of those under whose direction the church was built, to secure the means of effecting for some purpose, whatever that purpose might be, a separation between the two portions of the apparently one church. About the same time that this church was built, a college consisting of a master, or custos, and twelve chaplains, was founded, under licence from the King, by the then Earl of Arundel; the then existing Benedictine priory, to which I have referred, was suppressed or dissolved, and all its property was, by the like licence of the King, vested in the college. Amongst the property so vested in the college was a building which had at one time been the rectory of the parish church, but had been made over as a residence for the prior and monks shortly after their establishment in Arundel. Now this college was founded for the performance of certain specified sacred offices; offices which were perfectly distinct from those which

1880

DUKE OF NORFOLK v. ARBUTHNOT.

Baggallay, L.J.

the vicar of the parish, as such, would be bound to perform in the parish church. The master and chaplains of the college, upon whom was imposed the duty of performing these sacred offices, were bound by their statutes to reside in the building so vested in them, and a chapel, either within, or external to, the parish church was essential to the due performance of their offices. Bearing in mind that the Earl of Arundel, at whose cost the church was built, also founded the college, and, within the limits of the King's licence, imposed upon it its duties, I can see nothing prima facie unreasonable in attributing to him the intention that that which, architecturally considered, was the chancel of an entire church, and might be spoken of as the chancel or choir of such church, should nevertheless in fact be the chapel of the college, and should be used for the performance of the duties imposed upon the college, as fully and completely in all respects as if it had been a building separate and apart from the parish church, and that the remaining portion of the church should replace the previously existing parish church.

If such an intention existed, it would explain the introduction into the newly-erected church of the lattice or grille, as a means of securing the separation of the chancel from the rest of the church, with the view to the performance within it of those offices, which it was the special duty of the college to perform. Nor would the occasional, or even the frequent use of the college chapel for services, in which the parishioners could participate, be inconsistent with such an intention as that which I have suggested. I need hardly say that the existence of any such intention might be negatived by the facts as established by evidence. But is there any such evidence in the case we are considering? I think not. On the contrary, whilst much of the evidence appears to me to be quite inconsistent with the views put forward on behalf of the appellant, there is nothing proved which, in my opinion, is inconsistent with the view that it was never intended that the disputed building should form part, and that it never did form part, of the parish church. Now it is somewhat singular that neither in the licence of Richard II., nor in the commission and inquisition by which it was preceded, is there any mention made of a new church having been recently built, or of such a

1880

DUKE OF NORFOLK v. ARBUTHNOT.

Baggallay, L.J.

church being in process of building or as being about to be built, nor indeed of there being any necessity for the creation of a new church; the old church is spoken of as being deprived of its proper services by reason of the desertion or absence of the Benedictine monks by whom they ought to be performed, but no suggestion is made of its having gone to decay or its being out of repair. From this it appears probable that the erection of the new church had not been commenced at the date of the licence of 1380, and that possibly it was not even in contemplation. The foundation of the college was apparently at that time the paramount object of all parties. It is quite true that, eight years later, when the college was founded and its statutes were promulgated, allusion is made in the eighth chapter of the latter to the celebration of high mass "in magno altari" and of mass in honour of the Virgin "ad summum altare," until a special altar shall have been provided for that purpose, and also that daily, after the celebration of high mass "in cancello," a service shall be said by the chaplains standing in equal numbers on either side of the choir; but I do not gather from this that any more of the new building than "the chancel" had been then completed; the provisions in the statutes appear to be well adapted to regulate the performance of the prescribed sacred offices in a chapel belonging to the college, but there is no suggestion as to the performance of the offices usually performed in a parish church. It is quite possible, and in my opinion it is the more probable view, that the completion of the edifice was by way of adjunct to the already constructed chapel, and that such completion was either not in contemplation at the time when the statutes were framed, or that if it was in contemplation it had not been commenced. But, however this may be, the events subsequent to the promulgation of the statutes appear to me to negative the contention, that the chancel in question ever formed part of the parish church. I do not attach much importance to the direction in the will, dated in 1415, of Thomas Earl of Arundel, that he should be buried "in our College of Arundel before the high altar;" on the one hand it is said that it indicated the view of the testator that the building now in dispute was then a part of the possessions of the college, and on the other that he laid no claim

to any part of the church but only to the college; in my opinion the two views are not necessarily inconsistent. The wishes, however, of the Earl were complied with, and his tomb is the earliest in date of those which have been constructed in the church. But about a hundred years later a very important transaction took place. I refer to the dispute, which then arose between the college, who were the rectors of the parish of St. Nicolas, on the one part, and the mayor and parishioners of Arundel on the other, and to the award in the matter of such dispute made in 1511 by the then Earl of Arundel and Bishop of Chichester. It appears from this document that the dispute had reference to the repair and maintenance "illarum partium ecclesiæ, quæ vulgariter dicuntur ye crosse-partes, ducentes ab austro per medium inter chorum et navem ecclesiæ usque ad boream;" the appellant relies upon this description of the "cross partes" as shewing that at the date of the award the building now in dispute was recognised as the chancel of Arundel Church, and that the whole building was then regarded as one church. That the portion in dispute was commonly spoken of as the chancel of that church, would undoubtedly be suggested by the words I have quoted, if read by themselves; but it further appears from the same document that the south transept in which, as I have already mentioned, there was an altar, was commonly spoken of as the parish chancel, and the circumstance of the college being directed by the award to bear the cost of repairing and maintaining this transept, leads me to the conclusion that it was not only commonly called the parish chancel but was actually used as such, and that the building now in dispute, though it might properly be called the chancel of the entire church, was not at the date of the award used or recognised as the chancel of the parish church; how long the transept had been used as the parish chancel does not appear, but having regard to the comparatively short period of time which had elapsed since the building of the church and to the absence of any evidence that the chancel of the church had ever been treated as the chancel of the parish church, I am of opinion that the award taken by itself affords very strong evidence in support of the view that it never was so treated; and taking this evidence in connection with that to which I have previously referred, I have

1880

DUKE OF NORFOLK v. ARBUTHNOT.

Baggallay, L.J.

come to the conclusion that the building in dispute never did become, and that it was never intended that it should be, a portion of the parish church.

I have not omitted to bear in mind the arguments addressed to us upon the language of the documents connected with the foundation of the college, and particularly those based upon the expression of an intention to found a chantry or college "in ecclesiâ parochiali Sancti Nicolai;" but, having regard to the uncertain character of the language in which these documents are expressed, and bearing in mind the circumstances which undoubtedly existed previously to and at the time when the licence of the King was given for the foundation of the college, I am of opinion that these expressions cannot be treated as implying that the chantry or college was to be founded or established within the actual boundaries of the parish church, and that they point to no more than an intention to found and establish it in connection with the parish of Arundel, the advowson of the vicarage of which as well as that of the rectory it was intended to vest in the college.

BRETT, L.J. This case has been ably argued on behalf of the defendant; nevertheless I do not feel any doubt that the judgment of Lord Coleridge was right.

The act, which is the subject-matter of the dispute, was an act done by the defendant, the vicar of the parish, whilst the plaintiff was admitted to be in possession of the disputed building, and that act of the vicar was primâ facie an act of trespass, and the vicar could only justify that act as against the possession of the Duke by shewing that he was justified in law in committing that act. The burden of proof lies upon the vicar. Unless he can shew that he had a right to deal with the building in dispute, he was guilty of a trespass. It was contended that the question to be determined by us took the form of a dilemma, namely, that the building in dispute was either the private chapel of the Duke of Norfolk or the great chancel of the parish church. I do not think that this dilemma exists. If the disputed building is not the great chancel of the parish church, it signifies not under what right it belongs to the Duke of Norfolk; further, unless the

chancel belongs to the parishioners, it signifies not whether he has any right against some other person. The possession alone is sufficient title as against this act of the defendant, unless he can shew that at some time this building was the great chancel of the parish church in the possession of the parish as such; I agree that if ever it was in that condition, the rights of the parishioners could not be defeated by anything which has been done; but it is not the decisive question whether this building is the private chapel of the Duke of Norfolk.

Upon considering the evidence it seems to me that every action of the Duke's predecessors was probable and natural if the building was their property, and that every act of the long succession of vicars until the present one was improbable and unnatural if the building was the great chancel of the parish church. I accede to the view that no one act on either side has been proved which is inconsistent with the alleged right of the other side. If any one act on either side could have been proved which was really inconsistent with the right proposed by the other side, that act must have decided the case. Where many acts are consistent with either view, if one could be found inconsistent with one view, that would decide the case notwithstanding all the other indecisive acts. But here no act was absolutely inconsistent with either view. The question, therefore, is upon which side the evidence predominates. Now, it seems to me that the evidence may be classed in the following manner. From the time when the church was built until now, only the undisputed part of it has been used as a parish church; the disputed building has never been used as part of the parish church. Since the Reformation the Communion Table has never been placed in this building, which is said to be the great chancel of the parish church, but it has always been placed in the undisputed portion. The returns of the vicars, which were made at visitations, have most certainly treated the undisputed portion of the building as the parish church, and treated that part as being the whole of the parish church, which is quite contrary to any view of the disputed building being the great chancel of the parish church. The answers were quite wrong if it were so, because these answers state that the Communion Table was in the proper place, that the Commandments were put up in

1880

DUKE OF NORFOLK v. ARBUTHNOT.

Brett, L.J.

the proper place, and if this was the great chancel of the church it is obvious the answers were wrong. This is not inconsistent with its being the great chancel of the parish church; but it is very improbable that a long succession of vicars and churchwardens should have made erroneous answers, which should have been accepted without dispute if this were the great chancel of the parish church.

There have been burials in the disputed part, but they have been burials of the families of the Dukes of Norfolk or of their predecessors. It is quite true that with regard to some of them the vicar of the parish has performed the service at the grave. Lord Coleridge has said that Roman Catholic families do not object to the burial service of the Church of England, and this appears to me to be correct; the reason why they do not object is perhaps to be explained by the consideration that in the Roman Catholic ritual there is no service at the grave, and therefore that the service which is performed by the Protestant clergyman is not inconsistent with their ceremonies. There is another series of burials which does seem to my mind to be more improbable, if the vicars before the present vicar ever claimed any right to this chancel, and that is burials of the members of the Norfolk family without any interference of the vicar, without any leave asked, without any fees paid; I may particularly mention the burial of the domestic chaplain of the Duke of Norfolk. This was alleged to be a surreptitious burial, that is, a burial purposely concealed from the vicar; but I can find no ground for the suggestion. Such a circumstance as this seems to me not indeed quite inconsistent with the defendant's case, but it is wholly improbable that such a series of burials should have happened without any remonstrance or objection on the part of the vicars, unless they were persuaded that this building was no part of the parish church. Moreover vaults have been excavated within this building without any leave asked of any body, contrary to what would be the ecclesiastical law if this building were part of a parish church. There were even disinterments without any leave asked of the vicar or any faculty obtained from any body. There is moreover the fact of the building having been allowed to go into decay. I confess that this circumstance

does not strike me in the same way as it did Lord Coleridge. He seems to have looked on it as one of the greatest proofs of ownership in the plaintiff; perhaps it is so when it is considered in this light: it is almost impossible to suppose that the Dukes of Norfolk would have been allowed to suffer this building to go into the decay in which it is without any remonstrance from the vicars or churchwardens of the parish, unless they had been persuaded that it was no part of the parish church. Assume that it was the chancel of the parish church, but that the Dukes of Norfolk had peculiar rights over it; if that be so, they would have been bound to repair it; and there cannot be a doubt that the parishioners would have claimed from them that it should be repaired. Therefore from the time when the grant of the church, whatever that might mean, was made by the King in the largest possible terms to the predecessor of the plaintiff, the great preponderance of the evidence is in favour of the view that this disputed building was the property of the Duke of Norfolk or at all events was no part of the parish church.

But it has been contended that the evidence before the time of that grant is wholly inconsistent with the view that this was not a part of the parish church; and the facts relied upon are the documents and the statements therein contained. It is said that the King could only grant what had been surrendered by the college. That is very true. I accede to the view that in point of structure there is but one church, and that the disputed building is the great chancel of that church; and I agree that the documents shew that until the college came to an end it was used as the chancel of the church, and that the only high altar was in that chancel. It was said that these circumstances were conclusive for several reasons. One reason was that certain ceremonies of the Roman Catholic Church could only be performed at a high altar, I mean such ceremonies as high mass; but upon inquiry I find that these ceremonies might be performed at the altar which is in the south transept, and that marriages likewise might be there celebrated. The argument which was rested upon the mode of celebrating the Roman Catholic ritual seems to me inconclusive. Reliance was also placed upon the language of the documents; but the language is not always grammatical or

1880

DUKE OF NORFOLK v. ARBUTHNOT.

Brett, L.J.

correct, and too much stress cannot be placed upon it; it seems to me inconclusive. Then the award seems to me to be, when added to all the other facts, fatal to the contention of the defendant. The fact of such a dispute arising shews that the condition of the whole church was abnormal. If it had been clearly admitted to be a parish church and nothing else, no such dispute as existed could have arisen. And, as it seems to me, the assumption made in the submission could not have been acceded to by the college, or would have been put forward by the parish. It may be that assuming the whole church to be the parish church, it would have been assumed that the college should repair the chancel, but it could not have been assumed that the college should repair the Lady Chapel. In an ordinary parish church that would beyond question be a part of the church to be repaired by the parish. The award with the admission and disputes recited in it is almost inconsistent with the contention of the defendant. At least it is most weighty evidence against it.

It is as well to take a view of some of the facts of the case. It seems to me that the size and nature of the church were extraordinary if it was built merely as a parish church. I think it cannot be doubted that there was a parish church there before. If the present church had been built upon the foundations of the old church, we should have had some notice of them. It seems to me that the size of the parish as contrasted with the size of the church and the fact of none of the foundations of the old church being visible, are strong to shew that this is a much larger church than the old one. I infer myself, that it was a much larger church than was necessary for the parish. It was obvious that the church was built by the Earls of Arundel at their own cost, and that it was not built by the parishioners. They were great Roman Catholic nobles, and they intended to build the church for the sake of the college of secular priests and not merely for the sake of the parishioners. The statutes prescribe with great minuteness the mode, in which the members of the college were to perform the services in the church: they shew that the members of the college were to be considered to be the rectors of the parish; and the rectors appointed a vicar who was to perform the services of the church. It was said that as they were

1880

DUKE OF NORFOLK v. ARBUTHNOT.

Brett, L.J.

ecclesiastical rectors of the parish, they could prevent the vicar whom they appointed from performing the service of the church and could perform it themselves. I think that an incorrect view. They were not the ecclesiastical superiors of the vicar. They could not give him orders at their pleasure, and he as vicar would have a right to perform the proper parochial services. If the chancel was part of the church, the statutes ought to have provided in what cases the vicar should perform services at the altar in this chancel. But it is obvious that they did not contemplate that the vicar should perform any services at this altar, and there is no evidence that any vicar has ever performed any service at this altar except the service at the burials of those connected with the Dukes of Norfolk. It seems to me that the statutes and muniments shew that this church never did belong to the parish, but that it was built for and given to the college, and that inasmuch as it was built partly upon the site of the old parish church the parishioners had some rights over the church although it did belong to the college, and that the vicar had the right to perform upon their behalf all the necessary Roman Catholic services. There was one church which belonged to the college, in which the college was entitled to perform in every part of the church all Roman Catholic services; the vicar, on the contrary, on behalf of the parishioners, was entitled to perform the services only in part of the church, and that part was originally the south transept. It was argued that this state of things could not exist, that no such division of one church could be supposed; but Lord Coleridge has pointed out certain instances in which it has actually happened both in Roman Catholic times and since: I may mention the chapel of Eton College, the Lady Chapel of Ely Cathedral, Carlisle Cathedral, Durham Cathedral, and Merton College, Oxford. In all these cases the church or cathedral has not belonged to the parishioners but to other persons, and the parishioners merely had a right to perform services there. I come therefore to the conclusion that all the acts before the grant by the King to the Earl of Arundel, are consistent with the view that this church belonged to the college and not to the parishioners, but that the parishioners had the right to perform all the services of the Roman Catholic Church in the south transept. But the parishioners have

1880

DUKE OF NORFOLK v. ARBUTHNOT.

Brett, L.J.

obtained by lapse of time against the Dukes of Norfolk, an absolute right to the whole of the church except the building in dispute, and perhaps the Lady Chapel. This seems to me to be the true result of this case. It follows, therefore, that the judgment of Lord Coleridge was right.

Judgment affirmed.

Solicitors for plaintiff: *Few & Co.*
Solicitors for defendant: *Brooks, Jenkins, & Co.*

June 23.

DITCHAM *v.* WORRALL.

Infant—Promise to Marry—Infants Relief Act, 1874 (37 & 38 *Vict. c.* 62)—*Ratification or fresh Promise.*

In July, 1875, the plaintiff and defendant (both being then under the age of twenty-one) mutually agreed to marry one another. The engagement continued without any definite understanding as to when the marriage was to take place until March, 1879, when (both having attained the age of twenty-one) the defendant asked the plaintiff, in the presence of her father, to fix the wedding-day. She fixed it for the 5th of June, to which the defendant assented: but ultimately he broke his promise.

In an action for this breach of promise, in which it was agreed that the damages should be assessed, subject to the opinion of the Court as to whether or not that which took place in March, 1879, was evidence from which the jury might and ought to infer a fresh promise to marry after the defendant had attained twenty-one, within s. 2 of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), or a mere ratification of the original void promise:—

Held, by Denman and Lindley, JJ., that what took place in March, 1879, when the wedding-day was fixed, was a fresh promise made after the defendant came of age, and upon a good consideration.

By Lord Coleridge, C.J., that it was a mere ratification of the original promise made by the defendant during his minority, and not a binding promise within the statute.

Coxhead v. *Mullis*, 3 C. P. D. 439, and *Northcote* v. *Doughty*, 4 C. P. D. 385, commented upon.

THIS was an action for breach of promise of marriage tried before Lord Coleridge, C.J., at the sittings at Westminster on the 11th of March last. The facts proved were as follows:—In July, 1875, the plaintiff and defendant mutually agreed to marry each other, both being then under the age of twenty-one, but no time was fixed for the marriage to take place. The defendant

attained his majority in December, 1878; and they still continued on the footing of engaged lovers. In March, 1879, some months after he had attained his majority, the defendant asked the plaintiff, in the presence of her father, to fix the day for the marriage. The plaintiff named the 5th of June. To this the defendant assented. Subsequently, however, the defendant declined to marry the plaintiff, and this action was brought.

No question was left to the jury except as to the amount of damages the plaintiff was entitled to, if the Court should be of opinion that what took place between the parties in March, 1879, was evidence from which the jury might and ought to infer a fresh promise, made by the defendant after he attained his majority, as contradistinguished from a mere ratification of the promise made by him during his minority.

The jury assessed the damages at 400*l.*

May 6, S. *H. Matthews, Q.C.*, and *Spokes*, moved for judgment for the plaintiff for the damages assessed by the jury. They submitted that, assuming, on the authority of *Coxhead* v. *Mullis* (1) and *Northcote* v. *Doughty* (2), that the original promise to marry was void by the operation of s. 2 of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), that which passed in March, 1879, —the asking the lady to fix a day for the marriage to take place,—was not a mere ratification of the original promise, but a fresh promise to marry, founded upon a good consideration. They cited *Mawson* v. *Blane* (3), *De Thoren* v. *Attorney-General* (4), and Maine's Antient Law, 7th ed. 323.

Digby Seymour, Q.C., and *Bucknill*, for the defendant, contended that what passed between the parties in March, 1879, was not a new promise, but a mere ratification or confirmation of the original void promise; that, if it could be construed as a ratification, it must be so construed; and that it was not the less a ratification because under certain circumstances it might be evidence of a fresh promise. They referred to *Harris* v. *Wall* (5), *Rawley* v. *Rawley* (6), and to 9 Geo. 4, c. 14, s. 5.

Cur. adv. vult.

(1) 3 C. P. D. 439.
(2) 4 C. P. D. 385.
(3) 10 Ex. 206; 23 L. J. (Ex.) 342.
(4) 1 App. Cas. 686.
(5) 1 Ex. 122.
(6) 1 Q. B. D. 465.

1880

DITCHAM v. WORRALL.

The Court being divided in opinion, the following judgments were delivered:—

LINDLEY, J. (read by Lord Coleridge, C.J.) Before the defendant came of age, he and the plaintiff agreed to marry each other; but no time for their marriage was then fixed. The promise thus made by the defendant was not binding on him whilst under age; nor, since 37 & 38 Vict. c. 62, was it capable of being ratified by him after he came of age: this was decided in *Coxhead* v. *Mullis* (1), which, unless it should be reversed, must be taken as binding on us.

After the defendant came of age, his engagement with the plaintiff continued for some three months; and at last the day for their marriage was fixed. Ultimately, however, the defendant refused to marry the plaintiff, and she thereupon brought this action against him. The question is whether she can sustain it. If she can, the verdict is to be entered for her for 400*l.* damages; if she cannot, the verdict is to be entered for the defendant.

The question for our decision depends upon the true legal effect of what took place after the defendant came of age, regard being had to the fact of his engagement before that time. But for the fact of the defendant's previous engagement, his conduct after he came of age, and the fixing of the day for the marriage between himself and the plaintiff would not only be evidence of, but would in my opinion satisfactorily prove, a promise by the defendant after he came of age to marry the plaintiff on the day fixed. Nor is there, I believe, any difference of opinion on this point.

But it is said that the conduct of the defendant and the fixing of the day for the marriage are all referable to the promise made by him when under age, and amount to no more than a ratification by him of such promise.

In order to determine which of these two views is in point of law the more correct, it is necessary to determine the real meaning of a ratification as distinguished from an independent promise. A ratification necessarily has reference to the past, and, as applied to promises made by the person ratifying, a ratification is simply an intentional recognition of some previous promise made by

(1) 3 C. P. D. 439.

him, and an adoption and confirmation of such promise with the intention of rendering it binding. (1) In other words, a ratification of a voidable promise is a recognition of it and an election not to avoid it but to be bound by it.

There may or may not be any new consideration for a ratification; but there must be a consideration for a new and independent promise. If, therefore, in any particular case there is no consideration for the alleged ratification, it may be binding as a ratification, but not as a fresh promise. Again, a so-called ratification, which introduces new terms and stipulations, is, at least as to these, a new promise, and is binding as such if there is a consideration to support it, but not otherwise. Where there is a consideration and no new term introduced, the intention of the parties, if clearly expressed, will afford a test whereby to determine whether there has been a new promise or only a ratification of a former promise. But, where the intention of the parties respecting this particular point is obscure, their words or conduct ought to be so interpreted as to render valid the transaction in which they were engaged, if it is clear that this result at all events was intended by them, and if there is no law rendering such interpretation inadmissible.

In this particular case the consideration for the ratification or new promise was the willingness of the plaintiff to marry: that willingness was expressed when the original promise was made, and was again expressed when she fixed the day for the wedding, and continued throughout until the engagement was broken off. The plaintiff's willingness to marry on the day ultimately fixed for the wedding is a sufficient consideration to support a fresh promise by the defendant to marry her on that day. With respect to the intention of the parties, all that is plain is that they considered themselves under an engagement to marry and ultimately intended to marry on the day fixed. Their minds were never addressed to the question of ratification, as distinguished from a fresh promise; and their intentions as expressed by themselves throw no light whatever on the question whether what occurred was actually intended to be a ratification of a previous promise or to be a fresh and independent promise. To hold this

(1) See *Harris* v. *Wall*, 1 Ex. 122, and *Rowe* v. *Hopwood*, Law Rep. 4 Q. B. 1.

1880

DITCHAM v. WORRALL.

case to be one of ratification would be to render the engagement of the parties invalid and not binding, contrary to their manifest intention; whilst, to hold that there was a fresh promise to marry, will be to give effect to that intention. Unless, therefore, the statute forbids such an inference from their conduct, it appears to me that the jury might have found, and ought to have found, that there was a promise by the defendant after he came of age to marry the plaintiff on the day ultimately fixed for the marriage, and not a mere ratification of a promise made previously to marry at a day to be thereafter fixed.

This method of reasoning is in my opinion warranted by the decision of the House of Lords in *De Thoren* v. *Attorney General* (1), in which a valid Scotch marriage was inferred from habit and repute, although there had been an invalid solemnization of marriage which accounted for the living together of the parties, and to which in fact all their subsequent conduct was referable. In order to give effect to the manifest intention of the parties, the House of Lords in that case held that a subsequent promise to marry ought to be inferred from their conduct. In my opinion the present is a much clearer case, by reason of the fixing of the day for the wedding; for, although this is no doubt to be accounted for by the original engagement, it is a clear and distinct renewal of the original promise with an important addition, and not a mere recognition of such promise and election to abide by it.

It remains, however, to consider whether the statute excludes the view which but for it ought in my opinion to be taken of this case. The statute was passed to protect persons from the consequences of entering into engagements when under twenty-one and ratifying them after attaining twenty-one. As regards debts contracted before twenty-one, the statute goes further, and invalidates any promise made after twenty-one to pay them. The statute, however, does not go so far as regards promises after twenty-one to perform other obligations made before that age; and it has already been held that a new and independent promise to marry made after twenty-one is not invalid by reason of its being preceded by a promise to marry made before twenty-

(1) 1 App. Cas. 686.

one: *Northcote* v. *Doughty*. (1) Still it must be borne in mind, that, as regards ratification, the statute applies to and invalidates every ratification by a person who has attained his majority of a promise made by him whilst under age, whether there be a consideration for such ratification or not. In every case which arises under the Act care must therefore be taken not to deprive persons of the protection intended to be afforded them by it. Where the intention of the parties is obscure, where the so-called new promise is made soon after attaining twenty-one, where it is the consequence of an influence against which it is necessary to guard,—in all such cases a jury ought to be warned not lightly to infer a fresh promise as distinguished from a ratification. But the present case is free from all embarrassing considerations of this kind; and the facts of this case were such that, notwithstanding the statute, a jury might properly and I think ought to have found that there was a fresh promise as distinguished from a ratification.

I am, therefore, of opinion that the verdict and judgment ought to be entered for the plaintiff.

DENMAN, J. In this action for breach of promise of marriage it was proved that the defendant during his minority made an express promise of marriage to the plaintiff; which was accepted by her. The parties behaved as an engaged couple from that time, and continued to do so for three months after the defendant had attained his majority. On a particular occasion, about three months after the defendant came of age, the plaintiff and defendant met, and the defendant requested the plaintiff, in the presence of her father, to name the day for their marriage; and the plaintiff named a day, and it was then arranged that the marriage should take place on that day.

Under these circumstances, two questions have been raised,—first, whether there was any evidence which ought to have been left to the jury of a promise to marry made after the defendant had come of age,—secondly, whether upon the evidence given the jury ought to have found for the plaintiff or the defendant; the Court being, as I understand, substituted for the jury, by consent

(1) 4 C. P. D. 385.

1880

DITCHAM v. WORRALL.

of the parties, in case it should be of opinion that there was evidence fit to be submittted to a jury. Upon both these questions I am of opinion that the plaintiff is entitled to succeed.

It was decided by this Court in *Coxhead* v. *Mullis* (1) that s. 2 of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), applies to actions for breach of promise of marriage. By that decision I am bound. That case further decided that, where there has been an express promise of marriage during the infancy of a defendant, and the only evidence subsequently is evidence of mere conduct on the part of the engaged couple, consisting of their treating one another as an engaged couple and keeping company as such, without any evidence of words capable of being construed as a fresh promise, such conduct must be referred to the promise made during the infancy of the defendant, and held to be mere evidence of ratification within the meaning of the above clause. But it has also been held, in *Northcote* v. *Doughty* (2), by which I am also bound, that, where there is evidence not only that the defendant after coming of age and the plaintiff behaved as before, but that the defendant used language capable of being considered as a fresh promise, it is for the jury to find whether the words so used amount merely to evidence of a ratification of the promise made during infancy, or whether they prove a fresh promise. In the present case, I think that the words proved to have been used on the occasion on which the defendant asked the plaintiff to fix the day for their marriage, are words amply capable of amounting to a fresh promise to marry, and that on that ground the case ought not to have been withdrawn from the jury. I think it would be impossible to hold otherwise without straining the Act, so as to include a case which it is impossible to suppose that the Act was intended to include. I may, perhaps, be unduly influenced in coming to this opinion by a doubt, which I cannot overcome, whether the Act was intended to apply to the case of promises to marry at all, and whether the case of *Coxhead* v. *Mullis* (1) was rightly decided: but I think that, in any case, the statute was not intended and ought not to be construed to go so far as to warrant a nonsuit in the present case. Even assuming *Coxhead* v. *Mullis* (1) to have been rightly decided, I cannot think that an

(1) 3 C. P. D. 439. (2) 4 C. P. D. 385.

action, supported by such evidence as that which was given in this case, must necessarily be held to be "an action brought whereby to charge a person upon a ratification made after full age of a promise or contract made during infancy." At the very least I think it was a question for the jury whether, under all the circumstances of the case, the language used was merely evidence of a ratification of the promise made during infancy, or evidence of a fresh promise made after full age.

The question, then, being in my opinion one for the jury, I am to say, by consent of the parties, whether the jury ought to have found for the plaintiff or the defendant. On the whole, I am of opinion that the plaintiff was entitled to succeed. Three months had elapsed since the defendant had come of age. No time for the marriage had ever been fixed. There was evidence that it had been spoken of as an event that might not come off for many years. The parties met. The defendant asked the plaintiff to name the day for their marriage. The plaintiff named a particular day. She might then have declined to fix any day. She might have told the defendant that she preferred to be free, and that he himself was free because the only promise given by him had been given during infancy. Instead of doing this, she names a day in the presence of her father, and thereupon arrangements are made for a marriage on the day named. I consider that this all put together amounts to cogent evidence of a mutual promise to marry one another on the day named, made by both parties after the defendant had attained his full age, and that it is not mere evidence of ratification of the promise made three years previously, during the infancy of the defendant, to marry at some indefinite future period.

For these reasons, I am of opinion that the plaintiff is entitled to judgment for 400*l.*, the damages assessed by the jury, and costs.

LORD COLERIDGE, C.J. In this case I am unable to agree with the judgments of my learned Brothers; and, although I cannot say that in the face of their difference I feel confident of my own opinion, yet, as I entertain it, I must express it.

Two points arise in this case, one directly, the other indirectly;

1880

DITCHAM v. WORRALL.

the latter far the most important of the two, and therefore to be first considered.

In the case of *Coxhead* v. *Mullis* (1), my Brother Lopes and I held that 37 & 38 Vict. c. 62, the Infants Relief Act, 1874, applied to the contract of marriage. That case has never been overruled; but, in the later case of *Northcote* v. *Doughty* (2), and again in his judgment in the present case, my Brother Denman does not conceal his opinion that it was not well decided. It is true that my Brother Lindley accepts the case, and in a sense so does my Brother Denman; but, if it is not law, the sooner it is overruled the better; and, as the only judgment actually pronounced in it is mine, I ought, if on consideration I think it wrong, to say so, and to give every facility for having it reviewed in the Court of Appeal. If it is not law, there is a short and summary end to the case before us, because I do not question that, but for 37 & 38 Vict. c. 62, the verdict in this case ought to be entered for the plaintiff. Is it law, then, or, to put it in other words, are contracts of marriage within 37 & 38 Vict. c. 62?

I do not pretend that the question is easy, nor that the answer to it is clear. The preamble is general, and applies in terms to contracts of infants without restriction, and to ratification by persons of full age of contracts made by them during infancy, also without restriction. It speaks also of necessaries, distinguishing contracts as to them from other contracts. And it then proceeds to enact in s. 1, that certain contracts, certainly *not* contracts of marriage, made by infants shall be absolutely void. The enacting part is followed by a proviso not perhaps very happily or clearly worded, but recognising unquestionably the existence of contracts voidable as distinguished from contracts absolutely void; an important recognition, as it seems to me, when the language of s. 2 has to be dealt with. If contracts of debt only are made void, but the existence of other voidable contracts is recognised, it is surely not unreasonable to think that a contract of marriage may be one among the latter class dealt with by the Act, as it certainly was before the Act a contract voidable by the infant.

Then comes the second section, which like the first is in two parts. By the first it is enacted that no fresh promise made after full age shall be ground of action in the case of a contract of debt

(1) 3 C. P. D. 439. (2) 4 C. P. D. 385.

made during infancy; by the second, no ratification made after full age of any contract or promise made during infancy shall be a ground of action. I own that, considering the distinction between contracts void and voidable to be recognised in the Act, that contracts of debt are void, but other contracts are voidable, it seems to me reasonable to hold that the second part of the second section deals with the contracts recognised in the proviso to the first, and that it enacts that no ratification by an infant after full age of a voidable contract (and, inter alia, of a contract of marriage) made by him during infancy shall be a ground of action. It seems to me clear that contracts other than of debt are dealt with in this section; for, if not, the second part of it is inoperative. Promise to do a thing already promised to be done must, at least in the great majority of cases, include ratification, though ratification does not include promise: and, if the first half stood alone, it would I think be impossible to hold that, though a fresh promise to pay a debt would not be a ground of action, a ratification of an old promise would. Besides, making every allowance for the difficulties of legislation, I cannot believe that no more is meant by the clause as to ratification than if the words "or ratification" had been inserted after the words "any promise" where those words first occur in the section. If so, it follows inevitably that contracts other than contracts of debt are within the section, and, if other contracts, then, as the words are unlimited, contracts of marriage.

The argument, no doubt, is verbal; but any discussion upon the words of a statute must needs be verbal; and, if it can be shewn with reasonable clearness that the words of a statute have a particular meaning, general considerations as to the policy of the statute, and reasonings as to what it ought or ought not to mean, appear to me to be not in point.

It has been said, and the observation is correct, that the words of this section are very nearly those of 9 Geo. 4, c. 14, s. 5, and that the words of s. 5 have never been held to apply to contracts of marriage. I am unable to say how far this latter assertion is correct; but, if it be, my answer is that at least there is no decision that they do not apply: but, if the words *are* the same, the interpretation of them should be the same. Further, 9 Geo. 4, c. 14, is a statute dealing primarily with limitation of actions, and

1880

DITCHAM v. WORRALL.

the statute before us is a statute dealing primarily with the protection of infants from improvident contracts made during infancy; and whereas the later statute suggests this defence, the earlier statute to an ordinary reader certainly does not.

Supposing these contracts to be within the words of the Act, it does not add much force to the argument to shew that they are within its mischief and its spirit. The verbal argument, however, if it needs confirmation, may have it from this consideration. It is not, indeed, every infant of either sex who needs protection, nor at every time. There are infants, as every one knows, abundantly able to take care of themselves: "Malitia supplet ætatem" is a maxim applicable by no means only to the criminal law. The infant who bought a horse from one dealer and sold it to two others, being paid by both his purchasers without ever paying his vendor, is not a solitary specimen of his class. But Parliament has chosen, on the whole for sound and good reasons, to protect infants by legislation from the consequences of their contracts: and there is nothing so mischievous, so fatal in its consequences, so capable at least of destroying the happiness and blasting the usefulness of a whole life, as a foolish and hasty marriage promised by a girl or boy and enforced upon a man or woman. If Parliament did mean to enact that the marriage contracts of girls and boys should not be made binding upon them as men and women by means only of acknowledgement or ratification, Parliament intended to enact what in my judgment is wise and right. I think Parliament did so mean, and I desire to give full effect to its intention.

I have been thus full in discussing the true meaning of the statute, because I think it materially affects the second question to be determined, viz. whether what happened in this case was a ratification or a promise. Holding these contracts to be within the Act, and desiring to give full effect to its provisions, I must be satisfied that what was said and done here *was* a fresh promise, before I can consent to a verdict for the plaintiff. I say "was a fresh promise," because that is, I conceive, the point to be established. "Evidence of a promise," in the sense in which those words are commonly used, will not do; and I think that in this argument a fallacy lurks in their common use. They have

survived from a bygone state of things, when they meant something very different from the meaning which it is now sought to affix to them. In former days, when neither plaintiff nor defendant could be witnesses,—a state of the law which survived as regards this action longer than as regards any other,—it was very seldom that the actual promise could be directly proved at all. It had to be inferred from conduct, from letters, from the giving of presents, from preparations for the marriage, from a hundred facts or documents consistent only or only reasonably consistent with a previous promise. These things were most properly put to juries as "evidence of a promise," not of a promise made and re-made every time a letter was written, or a kiss was given, or a present was made, or a settlement was agreed upon, or a wedding-day was fixed; but of a promise made, as such promises *are* made in real life,—once for all; evidence of a promise which explained these things naturally, of a promise which the jury were to find as a fact and of the existence of which they were to be satisfied. Now (unless I misapprehend the judgments of my learned Brothers), when the actual promise can be proved, nay, when it has been actually proved in terms, it is for the jury to say in each case whether evidence of phrases or acts or conduct, which in old days would been evidence of *the* promise, are or are not evidence of *another* and *fresh* promise, because the phrase or the act or the conduct implies a promise, or refers to a promise, or is consistent only with the existence of a state of mind which recognises the promise as binding at the time when the phrase or the act or the conduct is used or is done. Far better in my opinion to overrule *Coxhead* v. *Mullis* (1) plainly; or, if *Coxhead* v. *Mullis* (1) be well decided, to repeal the Act itself, than to give authority to a doctrine which will make the Act in cases of this sort practically a dead letter, and make for the parties to these actions a contract in law which I venture to say neither of them at the time of the supposed making of it ever dreamed they were making in point of fact. A very great man has said, "After all, things are what they are, and not other things." If there is a promise in terms, cadit quæstio: if there is not, I refuse to hold that, in a practical matter, two people did what (as it is a

(1) 3 C. P. D. 439.

1880

DITCHAM v. WORRALL.

contract and therefore a question of intention) I am certain they did not do.

As to the facts of this case,—I am quite content to take them as stated by my learned Brothers. There was a definite contract between the parties to the action when both were under age; they remained for years upon the footing of engaged lovers; at last it was agreed they should be married at a particular time, and on a definite occasion the parties met, and, the day being named by the plaintiff, the day so named was fixed as the wedding-day. Now, was this a fresh promise to marry made by them to one another, for, this I apprehend is essential to found the action? Or was it evidence of a recognition and a ratification of the promise which they had both actually made several years before to marry one another? It certainly was not a promise in terms; so far, at least, is conceded, or at any rate cannot be disputed. Was it in law a promise or a ratification?

In order to ground an action, the promise must be mutual; it must be an agreement, an aggregatio mentium, to the same terms at the same time; the promise of each being the consideration for the promise of the other. So that here there must have been an actual present fresh promise to marry one another on the day when, having promised years ago, the woman is asked to fix the day on which the promise is to be fulfilled, and fixes it accordingly. Pothier, again, says that for a binding contract there must be consent of contracting parties, capacity to contract, *a thing certain* to form the subject of the contract, and that the contract must be legal. So that the *thing certain* here was, I must presume, not the day which was uncertain before, which it was important to render certain, and which was rendered certain by the contract, but the marriage itself which had been already certain, as far as promises could make it so, for many years past. Take some parallel cases,—A man makes a binding contract for the purchase of a picture for 100 guineas, no time agreed for its being sent home; he has no space for it for some months; at last he obtains space; he calls on the vendor, and desires that the picture may be sent home, say on the 5th of June: held, I suppose, a fresh purchase and sale of the picture on the day when he calls to name the day. The same law, I presume, of a horse left for a reasonable time in a vendor's stable while arrangements

are being made for its reception by the purchaser, and a day afterwards named for its delivery on the completion of such arrangements. And so in a hundred other instances.

These are, it may be said, eadem per eadem. So they are; and he who accepts one conclusion may see no difficulty in accepting the other. But the consequences are to my mind startling, and such as till compelled by authority I am unable to accept. I will not appeal to the common sense of mankind, and ask whether any man or woman who fix their wedding-day do in fact think that they are then promising over again and afresh to marry one another, because I have most unfeigned respect for the sense of my learned Brothers, and their sense and mine have come on this question of fact to totally opposite conclusions. I can but fall back upon the saying already quoted; things are what they are, and not other things: and affirm that in my judgment (I am speaking, remember, of a case in which there is an actual subsisting and acknowledged contract to marry) a promise to marry is one thing, and fixing the day when the promise is to be performed is another thing and not the same.

On the other hand, what happened in this case appears to me exactly to fulfil the definition of a ratification,—Ratihabitio est consensus qui negotium perfectum insequitur. Here, the negotium, the contract, was long since perfectum. It had been completed years before; it was consented to, acknowledged, ratified in the strongest way when the day for its execution was ascertained. I am therefore of opinion that in this case there should be a nonsuit and judgment for the defendant.

I cannot, as regards the circumstances and the result of this particular case, regret that I am in a minority. The real facts and the facts proved in Court are, no doubt, not always the same; but judging, as only I can judge, by what was proved in Court, the conduct of the plaintiff was as good, and that of the defendant was as bad, as it could be; and, if the law will give them to her, the plaintiff appears morally well entitled to the damages which the jury have awarded.

Judgment for the plaintiff.

Solicitors for plaintiff: *Radford & Frankland.*

Solicitor for defendant: *G. E. Carpenter.*

1880
June 1.

BURNAND AND OTHERS *v.* RODOCANACHI, SON, & COMPANY.

Marine Insurance—Valued Policies—War—Destruction of Cargo by Enemy—Payment of Policies—Compensation paid by Neutral State—Right of Injured Party—Money received for Indemnities.

11 QBD 381

The plaintiffs, underwriters, granted to the defendants valued policies of insurance, including war risks, on a cargo of a United States merchant ship. During war between the United States and the Confederate States of America, a confederate cruiser, the *Alabama*, went out from a port of Great Britain, a neutral country, and destroyed the ship with others belonging to subjects of the United States.

The plaintiffs paid to the defendants as and for an actual total loss the amounts named in the policies, but the cargo was of greater real value.

A claim in respect of the damage done by the *Alabama* was made by the United States on Great Britain and was referred to arbitration, resulting in an award under which Great Britain paid to the United States a sum for compensation. The United States passed an Act of Congress forming courts for the distribution of this sum amongst subjects who had been injured, and whose losses were not fully covered by insurance. The defendants claimed in those courts, and received part of such compensation money for their loss exceeding the amount insured. The plaintiffs were prevented by the Act from making any such claim. They now sued the defendants to recover the compensation money so obtained by them.

Held, by Lord Coleridge, C.J., that there having been an actual total loss the valued policies were, as between the parties, conclusive of the value of the cargo; and that as the United States had distributed the sum received by them amongst their subjects, the defendants, although without any legal right to the amount received by them had nevertheless a moral or equitable right to it, and obtained it under circumstances which made them trustees of it for the plaintiffs who, notwithstanding the provisions of the Act of Congress, could recover it in an English Court.

Rev'd by C. of A. 46 LT 66 49 LJ 683 Rev'd affd by H. of L. 7 App. Cas. 3

ACTION tried before Lord Coleridge, C.J., without a jury.

The facts appear in the head-note and judgment.

Butt, Q.C., *Cohen, Q.C.*, and *J. C. Mathew*, for the plaintiffs.

Sir Henry James, Q.C., and the *Hon. A. Gathorne Hardy*, for the defendants.

LORD COLERIDGE, C.J. In this case 15,000*l.* has been paid by the plaintiffs to the defendants on a valued policy effected with the plaintiffs at a premium covering the war risks the subject of the insurance. The cargo of the ship *Lamplighter*, a cargo of

tobacco, was totally destroyed by the *Alabama*. The loss of the cargo of the *Lamplighter* formed one of the items of the claim made by the United States against Great Britain; which claim was dealt with by the Treaty of Washington in May, 1871, and by the award subsequently made at Geneva, under that treaty. When the sum awarded under that arbitration had been paid by Great Britain to the United States it was dealt with and payments were made out of it to claimants by a Court constituted under an Act of Congress passed in 1874; the provisions of which Act undoubtedly bound the Court and the suitors in it. In that Court the defendants were suitors, and were awarded by the Court a sum of many thousand pounds under the provisions of the 12th section of the Act of Congress, which it is important to set out in full.

It provides that "*No claim shall be admissible* or allowed by said Court for any loss or damage *for or in respect to which the party injured, his assignees or legal representatives, shall have received compensation or indemnity from any insurance company, insurer, or otherwise; but, if such compensation or indemnity so received shall not have been equal to the loss or damage so actually suffered, allowance may be made for the difference:* And in no case shall any claim be admitted or allowed for or in respect to unearned freights, gross freights, prospective profits, freights, gains, or advantages, or for wages of officers or seamen for a longer time than one year next after the breaking up of a voyage by the acts aforesaid: *And no claim shall be admissible or allowed by said Court by or on behalf of any insurance company or insurer either in its or his own right, or as assignee, or otherwise, in the right of a person or party insured as aforesaid,* unless such claimant shall shew to the satisfaction of said Court that during the late rebellion the sum of its or his losses in respect to its or his war risks exceeded the sum of its or his premiums or other gains upon or in respect to such war risks; and, in case of any such allowance, the same shall not be greater than such excess of loss: and no claim shall be admissible or allowed by said Court arising in favour of any *insurance company* not lawfully existing at the time of the loss under the laws of some one of the United States: *And no claim shall be admissible or allowed by said Court arising*

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1880

BURNAND v. RODOCANACHI.

in favour of any person not entitled at the time of his loss to the protection of the United States in the premises, nor arising in favour of any person who did not at all times during the late rebellion bear true allegiance to the United States."

Two things are clear from the facts as applied to this section,—1. That the defendants got their money from the Court on the proof, or allegation at least, that their actual loss in respect of the cargo of the *Lamplighter* exceeded the compensation or indemnity paid them by the plaintiffs under the policy,—and, 2, that the money could not have been obtained from the Court either by the plaintiffs suing in their own name or by the defendants suing on the plaintiffs' behalf; and the question is, now that the defendants have obtained the money under these circumstances, can the plaintiffs recover it from them? in other words, have the defendants obtained the money under circumstances which make them in respect of it trustees for the plaintiffs?

Two points arise,—1. Is the value in the policy which has been paid absolutely conclusive, in case of actual total loss, between the parties to the policy? and,—2. Was the payment of their money to the defendants more than a free gift, a pure act of grace on the part of the United States?

As to the first question, there has been an actual total loss, a positive complete destruction of the thing insured; and I think that in this case the valuation in the policy is conclusive between the parties. They have by agreement settled the value, and not left it open to future inquiry and dispute as between themselves: *Shawe* v. *Felton* (1); per Lord Abinger, delivering judgment in *Young* v. *Turing*. (2) It is conclusive between the parties in respect of all rights and obligations which arise upon the policy: *Bruce* v. *Jones* (3); and (a very strong case on this point, though perhaps not so strong upon the other,) *North of England Insurance Association* v. *Armstrong*. (4) Even the cases which it is said shew the valuation not to be for all purposes conclusive, are, when looked at carefully and their principle considered, no exceptions to the general rule. *Irving* v. *Manning* (5) shews, indeed, that,

(1) 2 East, 109.
(2) 2 M. & G. at p. 601.
(3) 1 H. & C. 769; 32 L. J. (Ex.) 132.
(4) Law Rep. 5 Q. B. 244.
(5) 6 C. B. 391.

in ascertaining whether or not there has been in fact a constructive total loss, the valuation in the policy is to be disregarded on principles of sense and justice: but, where the fact of the constructive total loss is aliunde established, the valuation in the policy fixes conclusively the sum which the insurers are to pay. If, then, there was in this case any right in the defendants, it arose out of the subject-matter of the insurance, and the valuation in the policy was conclusive between the plaintiffs and defendants.

But, was there any right? or was the awarding of the money by the United States Court merely a free gift of the money, a mere act of grace on the part of the United States Government? If it were, I am of opinion that this action would clearly be not maintainable: and, at first sight, there is much to be said for the contention that it is mere act of grace. The money out of which this is paid to the defendants is a sum of money paid by Great Britain to the United States, from one sovereign state to another; and *Rustomjee* v. *The Queen* (1) is a distinct authority for holding that money being paid by one sovereign state to another in respect of war losses occasioned by the paying state to the subjects of the receiving state gives no legal right whatever to a particular subject of the receiving state, compensation for whose loss has been paid to that state, capable of being enforced in any Court against the sovereign or the government of that state. It is therefore, no doubt, clear that the defendants could have had no legal claim capable of being enforced against the United States in their sovereign character. But it seems to be equally clear, as the result of great authorities both in England and in America, that, if a country puts a fund of this sort in course of distribution by regular process amongst such of its subjects as are morally entitled to share in the fund, then what their subjects so recover they recover as a right not perhaps enforceable by law, but yet with such a character of moral equity about it as makes them in respect of what they so recover trustees for those who in equity and justice are entitled to it. This appears to me to have been held in principle by Lord Northington, Lord Hardwicke, and Chancellor Kent, when Chief Justice of New York. The cases of

(1) 1 Q. B. D. 487; 2 Q. B. D. 69.

1880

BURNAND v. RODOCANACHI.

Blaauwpot v. *De Costa* (1), *Randal* v. *Cockran* (2), and *Gracie* v. *New York Insurance Co.* (3), appear to me clearly to shew that these great lawyers would have held the defendants in this case liable. The language of Lord Hardwicke and Lord Northington appears to me to shew that there is a right which or the result of which is one to the benefit of which the insurers are entitled. The language of Chancellor Kent, it may be said, is extra-judicial, for there was no such right in existence in the case before him. It is so; but the judgment is considered, and the deliberate opinion of Chancellor Kent is an opinion to which great deference is due.

If this money had been received by the defendants before the plaintiffs had been sued, or if the cargo had not been physically destroyed, but had been captured, and restored by the United States in specie, could it be maintained that the full amount of the policy would nevertheless have been due from the plaintiffs? I think it could not; yet in principle there is no distinction between the cases.

It has been said that the Act of Congress prevents the plaintiffs from recovering. Probably in the American Court that is so; but the Act of Congress cannot affect the rights of litigants in English Courts: and, if the defendants are possessed of money to which according to the principles of English law the plaintiffs are entitled, an English Court must give it to the plaintiffs, although it may have been the intention of the American statute by which the defendants got the money that the plaintiffs should not have it.

For these reasons I give judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*
Solicitors for defendants: *Markby, Stewart, & Co.*

(1) 1 Eden, 130. (2) 1 Ves. Sen. 98.
(3) 8 Joh. N. Y. Rep. 237.

THE ALLIANCE BANK OF SIMLA *v.* CAREY. 1880

Aug. 7.

Limitation of Actions—Bond executed in India—Specialty and Simple Contract Debts—Same Period of Limitation—Action in England not barred for Twenty Years.

Specialty debts in India have no higher legal value nor greater efficacy than simple contract-debts; and the same period of limitation, viz., three years, bars the remedy for both, but

Held, by Lopes, J., that where an action on a bond executed in India is brought in England, the bond cannot be treated as a simple contract; and, therefore, as the English Statutes of Limitation apply, the remedy is not barred until after the lapse of the period of twenty years prescribed by 3 & 4 Wm. 4, c. 42, s. 3, as the limitation for actions on contracts under seal.

FURTHER CONSIDERATION. This was an action brought on a bond to secure repayment of 14,000 rupees and interest.

This bond was dated 1871, and executed in India where specialty debts have no greater legal value or efficacy than simple contract debts, and the remedy for both is barred by the same period of limitation, viz., three years: Civil Code of India, chap. vi. The Indian Limitation Act, 1871, sec. 4, sch. 2, part vi.

The defendant set up the defence that the debt was barred, as more than three years had elapsed since payment of instalments or interest.

Cave, Q.C., and *Shortt*, for the plaintiffs, moved for judgment. The law of limitation of actions is part of the lex fori. This bond is sued upon in England, and therefore the English Statute of Limitation (3 & 4 Wm. 4, c. 42, s. 3) only can apply. But the bond is a document under seal, and the remedy on it is not barred by that statute until after the expiration of twenty years.

Finlay and *Mead*, for the defendant. The law of limitation is indeed part of the lex fori. But the English law governs this case. Everything relating to the efficacy of contracts is governed by the law of the place where it is made. By the law of India this so-called bond is merely a simple contract, and more than six years, the English period of limitations for actions on simple contracts, have elapsed since payment or acknowledgment of any part of the debt. Suppose the Indian law required an impressed seal

1880

ALLIANCE BANK OF SIMLA. v. CAREY.

and a waxen seal had no legal effect, a bond must be here treated as a simple contract, although bearing a waxen seal. A document accidentally blotted with wax at the end of the signature would not be regarded as a deed even in England. Story in his Conflict of Laws, 7th ed. § 240, p. 277, says, "Boullenois has discussed this subject in a most elaborate manner; and has laid down a number of rules which are entitled to great consideration. First, the law of the place where a contract is entered into is to govern as to everything which concerns the proof, and authenticity of the contract and the faith which is due to it; that is to say in all things which regard its solemnities and formalities," citing 2 Boullenois, ch. 46. p. 458. And see Story's Conflict of Laws, § 263.

Cave, Q.C., replied.

Cur. adv. vult.

LOPES, J. It was contended for the defendant that the plaintiffs' remedy was barred by the Statute of Limitations, default having been made in payment of instalments under the bond more than six years before the commencement of this action.

Specialty debts in India, where this bond was executed, have no higher value nor greater efficacy than simple-contract debts; and the same period of limitation applies to them as to simple contracts. If this action had been brought upon this bond in India, the plea of the Statute of Limitations as pleaded would have been a good answer. The action is brought in this country. We treat documents to which the parties have appended their seals as of a more solemn character than one to which a seal has not been attached, and give them an effect different from what they do in India. Our course of procedure with regard to them is different, and a different period of limitation applies.

The question is one of procedure, and as such must be determined by the law of the country where the action is brought. The document is under seal. An English Court cannot ignore this, and must give to it the effect that in this country belongs to it. I must hold therefore that the remedy under the bond cannot be barred except after the lapse of twenty years.

There will be judgment for the plaintiffs for 1650*l.*, and interest from the 5th of November, with costs. 1880

ALLIANCE BANK OF SIMLA v. CAREY.

Judgment accordingly.

Solicitor for plaintiffs: *Lattey & Hart.*
Solicitors for defendant: *Mead & Son.*

THE MAYOR AND THE FREE BURGESSES OF THE BOROUGH OF SALTASH *v.* GOODMAN AND BLAKE. *March* 22.

Fishery—Oysters—Navigable River—Corporation—Crown Grant of "Waters"—Several Fishery—Prescription—Claim of Inhabitants to Dredge—Immemorial Usage—No Evidence of Incorporation by Crown.

The plaintiffs, the mayor and the free burgesses of a borough, were incorporated by royal charters, and entitled to a several oyster fishery in a tidal navigable river. They sued the defendants for trespasses to the fishery.

The defendants were free inhabitants of ancient tenements in the borough. The free inhabitants of ancient tenements in the borough had from time immemorial, without interruption and claiming as of right, exercised the privilege of dredging for oysters in the river, from the 2nd of February in each year to Easter Eve in each year, and of catching and carrying away the same without stint for sale and otherwise. The acts complained of were done in exercise of this privilege. The usage to dredge oysters without stint for the purposes of sale or otherwise tended to the destruction of the oyster fishery, and, if continued, would destroy the fishery.

The defendants claimed to exercise the privilege: (1), as subjects of the realm; (2), as free inhabitants of the borough; (3), as free inhabitants of ancient tenements in the borough:—

Held, that they could not maintain such privilege on any of the grounds alleged, as it was inconsistent with, antagonistic to, and destructive of the plaintiffs' several fishery; and that the Court could not from the immemorial user alone, and in the absence of any evidence of an incorporation of the free inhabitants, presume a legal origin for the privilege by Crown grant to them.

Affirmed in H.L. 7 App. Cas. 633

SPECIAL CASE. This was an action of trespass brought against two inhabitants of the borough of Saltash, in the county of Cornwall, for a trespass alleged to have been committed by them in a certain part of the river Thamer, and on the soil thereof, wherein the plaintiffs claimed to be possessed of a certain several oyster fishery, and for disturbing, catching, conveying away, and converting to their own use divers quantities of the oysters therein for the purposes of sale and otherwise. The alleged trespass was committed by the defendants on the 2nd of February, 1876.

Sc as to question of costs of appeal W.M.(D.)
167. C.
Affirmed by H.L. 7 App. Cas. 633

1880

MAYOR OF SALTASH v. GOODMAN.

The defendants admitted the commission in fact of the acts complained of, but claimed the right to do those and similar acts at all reasonable times from the 2nd day of February to Easter Eve in each year both inclusive.

The plaintiffs were a corporation, incorporated by divers royal charters granted respectively in the reigns of Queen Elizabeth, King Charles II., and King George III. By virtue of such royal charters and by prescription the plaintiffs claimed to be possessed of the soil and of a certain several oyster fishery in those parts in the river Thamer and its tributaries described in particulars annexed to and forming part of the case. The royal charters mentioned were to be taken as forming part of the case, and so likewise were certain minutes of the corporation and other documents enumerated in a schedule.

The defendants were, and were at the time alleged in the statement of claim, free inhabitants of ancient tenements in the borough of Saltash.

9. The free inhabitants of ancient tenements in the borough of Saltash had from time immemorial without interruption and claiming as of right exercised the privilege of dredging for oysters in the locus in quo mentioned in the statement of claim from the 2nd day of February in each year to Easter Eve in each year both inclusive, and of catching and carrying away the same without stint for sale and otherwise. The acts complained of were done in exercise of the privilege. The river Thamer was at the time mentioned and at the locus in quo mentioned a navigable river or arm or creek of the sea where the tide flows and reflows.

The defendants contended that the soil of the Thamer, of the locus in quo, and the several oyster fishery, if any, were vested in the Crown or Duchy of Cornwall. The plaintiffs contended that the soil and several fishery were vested in them.

The defendants claimed to have exercised the privileges described in paragraph 9 as free inhabitants of the borough of Saltash.

The defendants also claimed to have exercised the privileges described in paragraph 9 as subjects of the realm.

The defendants contended that the user described in paragraph 9 raised the presumption and inference of a royal grant or charter

from the Crown or Duchy of Cornwall made either to the free inhabitants of ancient tenements in the borough of Saltash or to some person or body corporate in trust for them which said grant or charter had been lost, and the defendants relied as a justification for their acts on such last mentioned grant or charter.

The defendants alleged that this user was sufficient to establish their right in law to do the acts complained of upon the ground of custom or any other legal origin which might be reasonably presumed or inferred from such user.

If the plaintiffs were entitled to any right of fishery at all the defendants contended that it was a right of fishery, subject to the rights of the defendants, and that the plaintiffs had only a several or exclusive fishery sub modo, and against persons other than the free inhabitants of the borough of Saltash.

The defendants contended that such user from time immemorial was sufficient to establish the rights of free inhabitants of ancient tenements under 2 & 3 Wm. 4, c. 71.

The plaintiffs contended that an usage to dredge oysters without stint for the purposes of sale or otherwise in a several fishery was unreasonable and destructive of the fishery, and did not raise any presumption of any royal grant or charter, and could not be the subject of any prescription or right under the statute mentioned in the previous paragraph. The said usage did in fact tend to the destruction of the said oyster fishery, and if continued would destroy the same.

The questions for the opinion of the Court (who were to be at liberty to draw inferences of fact, and to make all such amendments in the pleadings as might be necessary to decide the real questions between the parties) were—

1. Whether the defendants as subjects of the realm were entitled to dredge for oysters, and to carry away the same without stint for sale or otherwise between the 2nd of February and Easter Eve in each year both inclusive?

2. Whether the defendants were entitled to the same rights as free inhabitants of ancient tenements in the said borough?

3. Whether the defendants were entitled to the same rights as free inhabitants of the said borough?

If the Court should be of opinion that the defendants were not

1880

MAYOR OF SALTASH v. GOODMAN.

so entitled judgment was to be entered for the plaintiffs for 40*s.*, and for an injunction as prayed in the statement of claim with costs of suit. If the Court should be of a contrary opinion, judgment was to be entered for the defendants with costs.

The pleadings were annexed to the case, and in an appendix to it were the royal charters granted to the plaintiff corporation. After reciting three charters, one granted by Henry VIII., confirming another granted by Edward IV., which confirmed another by Richard II., the charter of 27th Elizabeth ratified and confirmed them, recited that the burgesses of Saltash had from time immemorial held and enjoyed the aforesaid customs, rights, liberties, franchises, and privileges, as well by prescription as by reason of the aforesaid charters, and granted that the corporation should remain a free borough and hold the borough with its appurtenances and all the aforesaid customs, liberties, &c., and the like lands, tenements, "waters, watercourses, and the passage of Saltash," and "also the tolls of oysters," anchorage, lastage, and culage, &c. By the charter of Charles II., which recited the aforesaid rights by prescription and charters and that the corporation had surrendered into the king's hands "their several charters, and also all messuages, lands, tenements, and hereditaments, and all other charters, privileges, and immunities whatsoever" and prayed the king to regrant them, they were regranted accordingly. The charter of George III. also recited the aforesaid prescriptive rights and charters and ratified and confirmed them. The Appendix also contained the records in an action brought in the reign of Elizabeth for disturbance of the fishery, and decided in favour of the corporation, and the record in other actions in which the judgment was also for the corporation. Certain inquisitions held by the mayor as coroner on the bodies of persons found in the locus in quo, and leases by the corporation of the passage of Saltash with the sole privilege of dredging oysters, and accounts shewing payments to the corporation for oysterage were also set forth shewing acts of ownership on the part of the corporation down to a recent date.

March 18, 20.[1] *A. Charles, Q.C.* (*J. V. Austin,* with him), for the plaintiffs. First, the plaintiffs are possessed of the soil and of a several oyster fishery in the locus in quo. They are entitled by

their charters to the "waters, watercourses, and the passage of Saltash," and the profits thereof amongst them being "anchorage." That is "a toll for every anchor cast there, and sometimes though there be no anchor. And this doth in truth properly and primâ facie arise from or in respect of the propriety of the soil and is evidence of it:" Hale, De Portibus Maris; Hargreave's Law Tracts, p. 74. Subjects may possess an arm of the sea both the land and water, and they may be prescribed for: Hale De jure Maris; Hargreave's Law Tracts, p. 32, and subjects may by prescription have the interest of fishing in an arm of the sea, and not only free fishing, but several fishing, p. 18. The evidence shews the plaintiffs to have the waters of the Thamer, and the fish in them, and amongst those fish the oysters. The allegation of a several fishery primâ facie imports ownership of the soil: *Marshall* v. *Ulleswater Steam Navigation Co.* (1) The terms of the charter to the plaintiff corporation are inconsistent with any royal grant to certain inhabitants as alleged.

Next, as to acts of ownership. To ascertain the true construction of a grant acts done under it may be regarded: *Duke of Beaufort* v. *Mayor, &c., of Swansea.* (2)

The decision in *Rudyard* v. *Porter* was a judicial interpretation put on the charter of Elizabeth soon after it was granted, and is in favour of the corporation. So, too, is the judgment for anchorage dues in 1843 in the action by them against one Finemore.

There is a strong body of evidence shewing that for centuries the corporation have exercised the right of leasing the "passage of Saltash" and the sole privilege of dredging oysters. Further, there is the evidence afforded by the corporation accounts of a large rent paid. There is ample proof of a right in the plaintiffs inconsistent with that set up for the defendants.

Secondly. The defendants claim first, as subjects of the realm, secondly, as holders of ancient tenements within the borough, and, thirdly, as free inhabitants of the borough, to take oysters between the 2nd of February and Easter Eve without stint, for the purposes of sale or otherwise. But, in whatever character they claim, such a right cannot be supported in law. It is a right

(1) 3 B. & S. 732. (2) 3 Ex. 413.

1880

MAYOR OF SALTASH v. GOODMAN.

to a profit à prendre and cannot, therefore, exist by custom, prescription, or grant, unless it be a grant which incorporates the inhabitants: *Lord Rivers* v. *Adams*. (1)

[*Muir Mackenzie*, for the defendants, admitted that a custom to take a profit in alieno solo could not exist, and that oysters were such profit.]

Then, a Crown grant to the plaintiffs being in existence, the Court will not presume another Crown grant in favour of the defendants. The fact that the exercise of the right claimed might tend to the destruction of the subject-matter negatives such right: *Bland* v. *Lipscombe* (2); and here it is found that the exercise of the alleged right does destroy the subject-matter. This is sufficient to prevent the existence of such a right, whether claimed by prescription or by custom: *Attorney General* v. *Mathias*. (3) In that case free miners claimed to take stone without stint, and the Court held that their claim could not be established, 1, by custom, for it was a profit à prendre, which cannot be claimed in alieno solo; nor, 2, by prescription, for prescription to be good must be both reasonable and certain, and this was neither; nor, 3, by presuming a lost grant, for prescription pre-supposes a grant, and if such a grant cannot be presumed before, a fortiori, it cannot after, the period of legal memory; and a claim which cannot lawfully be made upon one of these three foundations cannot be substantiated by a user, however long. In *Clayton* v. *Corby* (4) the jury found that for thirty years the occupiers of a brick kiln had taken as of right clay in the plaintiff's close, yet the claim to do so was held bad. "There is no limit," said Lord Denman, C.J. "What is it, therefore, but an indefinite claim to take all the clay . . . . or, in other words, to take from the plaintiff, the owner, the whole close?" That the right here is set up only for free inhabitants is no real limit, as one of them might take all the oysters if he had a right to do so "without stint."

Muir Mackenzie (*Bullen*, with him), for the defendants.—At Common Law the subjects of the realm may fish for oysters: Hall on the Seashore, 2nd ed., p. 192; and take them without

(1) 3 Ex. D. 361.
(2) 4 E. & B. at p. 713-14, n.
(3) 27 L. J. (Ch.) 761.
(4) 5 Q. B. 415.

stint on the bed of the sea or of a public navigable river: Williams on Commons, p. 268. To displace that right the plaintiffs must shew a several fishery in themselves. The onus of proving it is on them. A several fishery, which will include oyster dredging: Williams on Commons, p. 264; *Mayor of Colchester* v. *Brooke* (1), is a sole and exclusive right to fish. But the plaintiffs' charters confer no such right. A fishery in a navigable river does not pass by the grant of the land adjoining, and by the general grant of all piscaries, for it is a royal fishery not appurtenant to the land but in gross: see per Bayley, J., in *Duke of Somerset* v. *Fogwell* (2), citing a great case of the fishery of the Banne. (3) A separate fishery does not pass under the general word "privileges," but the words "separalis piscaria," or "several fishery" are necessary: See *Duke of Northumberland* v. *Houghton*. (4) The grants to the plaintiffs are of "waters" and not of a fishery, and that is so for a good reason, because a grant of a several fishery in an arm of the sea could not be made after Magna Charta: Williams on Commons, p. 268; *Mayor of Colchester* v. *Brooke* (5), and there is no evidence of any such grant. But whatever rights the corporation may have had were surrendered in the reign of Charles II., and a several fishery could not then be regranted. The surrender of all charters would include the surrender of any supposed charter granting a several fishery. The evidence adduced by the plaintiffs being consistent with the rights claimed by the defendants is not enough to enable the Court to presume a right in the plaintiffs to a several fishery. They have no right against the defendants as subjects of the realm.

But assuming the plaintiffs to have raised a primâ facie presumption of a several fishery granted before Magna Charta, the defendants have a right which is not inconsistent. The fact is found in the case that the free inhabitants of ancient tenements in the borough have from time immemorial without interruption and claiming as of right exercised the privilege of dredging for oysters in the locus in quo from the 2nd of February to Easter

(1) 7 Q. B. 339.
(2) 5 B. & C. 875, at p. 885.
(3) Davis, 55.
(4) Law Rep. 5 Ex. 127.
(5) 7 Q. B. 339.

1880

MAYOR OF SALTASH v. GOODMAN.

Eve. That right is capable of legal origin. It is a cardinal rule, said Willes, J., in *Johnson* v. *Barnes* (1) "that antiquity of time justifies all titles, and supposeth the best beginning the law can give them." There has been immemorial usage, and from it the Court will, if it can, presume a legal origin. See per Blackburn, J., in *Bryant* v. *Foot.* (2)

A right of several fishery in the plaintiffs is consistent with a limited right of the defendants. A several fishery may exist with free fishers exercising co-existent rights: See note to *Rogers* v. *Allen* (3); *Mayor of Orford* v. *Richardson* (4); *Seymour* v. *Lord Courtney.* (5)

The characteristics of an ordinary fishery are found in an oyster fishery: *Mayor of Maldon* v. *Woolvet* (6); *Bagott* v. *Orr.* (7) There may be a several fishery, a free fishery, and common of fishery of oysters as of other fish. The exercise of the privilege is limited in point of time.

[GROVE, J. But the case finds that it is destructive of the subject-matter.]

A reasonable construction must be put on the finding. Eventually the subject-matter may be destroyed, but the privilege has been exercised from time immemorial without that effect following.

There is here a fishery of possible legal origin, and each of these free inhabitants could prescribe for it. They are to a borough what freehold tenants are to a manor.

[DENMAN, J. It is consistent with the case that any dweller in an ancient tenement, though but a lodger, could exercise the right. Have you any case of mere inhabitants prescribing?]

The defendants will give up the claim as inhabitants of the borough, but rely on that of free inhabitants of ancient tenements. The number of these is limited. Each of them has a free fishery appurtenant to it, and consistent with the plaintiffs' right, and each free fisher may claim by prescription: see *Warwick* v. *Queen's College, Oxford.* (8)

(1) Law Rep. 7 C. P. 592, at p. 604.
(2) Law Rep. 2 Q. B. 161, at p. 171.
(3) 1 Camp. 309, at p. 317.
(4) 4 T. R. 439; 2 Hy. Bl. 182.
(5) 5 Burr. 2814.
(6) 12 Ad. & E. 13.
(7) 2 B. & P. 472.
(8) Law Rep. 10 Eq. 105.

A. Charles, Q.C., replied. The claim as subjects of the realm is quite inconsistent with the right of the plaintiffs. That is evident from *Mayor, &c., of Orford* v. *Richardson.* (1)

The meaning of the terms free, several, and common of fishery were considered in *Holford* v. *Bailey.* (2) The result is that a several fishery is, and a free fishery is not, exclusive. And see Hargreave's note to Co. Lit. 122 a. The river in *Holford* v. *Bailey* (2) was not navigable, but on the present point there is no distinction between a non-navigable and navigable river, except that the owner of the former is a private individual, and the owner of the latter is the Crown.

The charters, though surrendered were regranted, and if they are not in terms large enough to confer the right claimed, then that right existed before them and has not been surrendered. All rights and privileges were regranted. A several fishery was amply granted by the word "waters": Co. Lit. 4 b.

There is a distinction between oysters and floating fish, for taking oysters affects the soil itself: see *Mayor of Maldon* v. *Woolvet* (3) and *Mannall* v. *Fisher.* (4)

The right claimed as free inhabitants cannot be sustained. They are a fluctuating body, and the analogy drawn between them and freeholders of a manor is unsound. The right cannot exist except by Crown grant, and of that there is no evidence, for the user is none: see *Chilton* v. *Corporation of London.* (5)

Cur. adv. vult.

GROVE, J. (after referring to the documents set out in the Appendix), said: The plaintiffs rely on a series of documents relating and referring expressly to prescriptions of time immemorial and also to acts of ownership, which is a title stronger than one often sees in a case of this kind. It is so strong that the learned counsel for the defendants in his very able argument, was, in the course of that argument, obliged to admit that the plaintiffs had by their evidence of acts of ownership made out a primâ facie case of a several fishery in this river. I am of

(1) 4 T. R. 437.
(2) 13 Q. B. 426.
(3) 12 Ad. & E. 13.
(4) 5 C. B. (N.S.) 856.
(5) 7 Ch. D. 735.

1880

MAYOR OF SALTASH v. GOODMAN.

Grove, J.

opinion that they do make out a primâ facie case of a several fishery, and also a very strong case, if that be material,—I do not know if it is very material to this case—of ownership of the soil which they also claim.

Before I pass from the plaintiffs' case I will add that there is authority for saying that although the words "several fishery" are not in the grant, yet where a man grants water and other rights of the kind, that would be sufficient to pass a several fishery. Lord Coke in Co. Lit. 4 b. says, "If a man grant aquam suam the soil shall not pass under that, but a fishery shall." Other authorities were cited to which I need not refer.

The defendants set up four defences; three of which were alleged in the special case, and the fourth was raised in the argument here. First, they say that they had a right to fish as subjects of the realm since Magna Charta, which provides that the banks of a navigable river shall not be defended, that is to say, shall not be fenced in so as to prevent the public fishing, and gives a right of fishing, and it was admitted by the plaintiffs that unless these grants can be traced to a time anterior to Magna Charta—the grants themselves being subsequent to Magna Charta—that they cannot get a right to a several fishery in the bed of a navigable river, although they possibly might have such a right in a private river. That was admitted as a primâ facie case by the counsel for the defendants, and I think there is ample evidence of prescription going back before the time of Magna Charta, and of a presumed grant previous to that time, giving the plaintiffs a several fishery. Then the defendants say that they had a right first of all as subjects of the realm. I take these points rather in the order of their argument than as they appear in the special case. That right is not set up in the special case. There is a right set up therein, which I will deal with presently, as subjects of the realm to have this limited privilege of dredging from the 2nd of February to Easter Eve, but there is no general privilege set up of fishing as subjects of the realm, and I am inclined to think that it was omitted intentionally from the special case, because it would amount to no more in fact than a traverse of the plaintiffs' alleged rights; because if every subject of the realm had a right of fishing in this river, then of course the

plaintiffs would take nothing by a grant of a several fishery which was at the same time universal. They could not have a several fishery which was open to every one of her Majesty's subjects throughout the realm.

Then the defendants set up a right in the free inhabitants of ancient tenements to dredge for oysters from the 2nd of February to Easter Eve in each year, and carry away without stint oysters for sale or otherwise. They then claim a similar privilege as free inhabitants of the borough. The claim with respect to their being free inhabitants of the borough was not really argued before us, and it would very much depend upon what could be said as to a claim on behalf of the free inhabitants of ancient tenements in the borough. The questions at the end of the case almost assume that which I have said was ultimately admitted, and really the admission could not be avoided. [The learned judge read the questions.] The case seems to assume the plaintiffs' title, and to throw the onus upon the defendants, and asks the Court if they were of opinion that the defendants had not established either of their three claims, to give judgment for the plaintiffs.

I will now deal with those three claims of the defendants. They first claim as subjects of the realm generally, and set up a right which would be absolutely antagonistic to and destructive of the plaintiffs' right, and would in fact amount to a negation of the plaintiffs' several fishery. Then the defendants say that the fishery was, by the grant, surrendered and was not re-granted. No doubt the word "surrender" is used in one, if not many, of the grants I have already read, but in the same grant, and in all the other grants, besides the word "regrant," which is throughout, there are the words "confirmatory of," or the words "confirm, ratify, and approve of" previous grants, and also all privileges and usages. Therefore I am disposed to think, quite apart from the question of the power of regranting, there is enough in these charters to shew that they intended to confirm all those matters besides the charters which required confirmation, such as privileges, immunities, and prescriptive rights which have been, as one of the charters says, from time immemorial, in the plaintiffs. In one part of the argument of the defendants it was contended that a several fishery is so irrespective of the mere title to the

1880

MAYOR OF SALTASH v. GOODMAN.

Grove, J.

soil, or title to both soil and the water of the stream in which the fishery exists, as not to merge in the title, and therefore to have, so to speak, a separate existence capable of being regranted. No doubt that is very much supported by the judgment of Mr. Baron Martin in the case of the *Duke of Northumberland* v. *Houghton* (1), which was a case of alleged forfeiture after Magna Charta, and the question was whether a several fishery was included, and whether that had merged or would be regranted. The plaintiff was held entitled to judgment. He was the person who claimed the several fishery, and Martin, B., says: "Now, assuming that the evidence makes out in fact the defendants' proposition, in my judgment their argument, which has been ably and candidly laid before the Court, has no foundation in law. The case seems to me to be really concluded by that of the *Abbott of Strata Mercella* (2) and by *Heddy* v. *Wheelhouse*. (3) In the former of these two cases Lord Coke expressly deals with the question raised here, and lays down the rules by which it may be determined what liberties merged when they reverted to the Crown, and what did not. The first refers to the intention of 32 Hen. 8, c. 20, which was, he says, to advance the possessions of the dissolved monasteries, as well in valuation as estimation, and to revive such franchises, &c., as the late owners of the abbeys had; and then he proceeds thus: 'It is' [therefore] 'to be considered what privileges, liberties, franchises, and jurisdictions were extinct in the Crown, by the accession of the said possessions to it. And as to that it is to be known that when the king grants any privileges, liberties, franchises, &c., in his own hands, as parcel of the flowers of his crown, as bona et catalla felonum . . . bona et catalla waviata . . . wreccum maris, &c., within such possessions, there if they come again to the king they are merged in the Crown, and he has them again in jure coronæ; and if the wreck or goods waifed, estrays, &c., were appendant before to possessions, now the appendancy is extinct and the king is seised of them in jure coronæ. But when a privilege, liberty, franchise, or jurisdiction was at the beginning erected and created by the king, and was not any such flower before in the

(1) Law Rep. 5 Ex. 127. (2) 9 Rep. 24.
(3) Cro. Eliz. 591.

garland of the Crown, then by the accession of them again to the Crown they are not extinct, nor the appendancy of them severed from the possessions; as of a fair, market, hundred, leet, park, warren, et similia, are appendant to manors, or in gross, and afterwards they come back to the king, they remain as they were before in esse, not merged in the Crown, for they were at first created and newly erected by the king, and were not in esse before, and time and usage has made them appendant, which difference was agreed per totam curiam.'" Then Martin, B., goes on with his own judgment. "Now, I think a several fishery is similar, not to the first, but to the second class of franchises enumerated by Lord Coke. It appears to me to be precisely analogous to a warren, and that being so, I think the present case comes directly within the authority I have cited." So I think here, that, if the word "surrender" can be held to apply or to take effect in regard to prescriptive rights which had been enjoyed from time immemorial, as well as to the surrender of the charter, in the first place there is nothing actually to surrender, the charter itself was surrendered, and the word "surrender" means merely, as it were, "nominally yielded up for the purpose of regrant." I think the charters can and do regrant them unquestionably, and I think also the confirmatory words in the charter are amply sufficient to confirm the ancient privileges, even if the word "surrender" be held to be applied to them in the charter; but, at all events, it was a regrant by the Crown to the corporation to hold them.

The main reliance of the defendants throughout was on a finding of the special case as to the immemorial user—that is to say, immemorial user without interruption and claiming as of right—for a limited time the taking of oysters without stint.

First, as to a right in the subjects of the realm. It certainly is to be observed that an immemorial user of a right to take oysters from the 2nd of February in each year till Easter Eve in the subjects of the realm is inconsistent with a general right in the subjects of the realm, because it is almost at the same time saying that the subjects of the realm have a right at all times in the year and always to take oysters from a navigable river without stint for sale, and also that they have a right to take them for a limited period, namely, from the 2nd of February to

1880

MAYOR OF SALTASH v. GOODMAN.

Grove, J.

Easter Eve. It is also very inconsistent with the strongest finding in this case in favour of the defendants, namely the finding that the free inhabitants of ancient tenements in the borough of Saltash have from time immemorial without interruption, and claiming as of right, exercised the privilege, because if the right is confined to free inhabitants of ancient tenements it is exclusive of other subjects of the realm. If the right exists in other, and in all subjects of the realm, then there is no need of any claim as free inhabitants of ancient tenements, and they have no peculiarity of right different from other subjects of the realm. So that really the four claims of the defendants are more or less inconsistent with each other; there is no finding in this respect in the special case of immemorial user of this limited right by the subjects of the realm, and there is nothing to shew any such limited right in the subjects of the realm as is set up. It appears almost to be upon the face of it a fiction. If the subjects of the realm have had a right since Magna Charta they have the right absolutely and throughout all the year. Therefore, it seems to me, there is nothing in support of the claims so set up. The claim in the special case is to have exercised the privilege described in paragraph 9 as subjects of the realm. The privilege described in paragraph 9 is that of dredging from the 2nd of February to Easter Eve without stint for sale or otherwise.

Then comes the question upon which the case seems really to have been mainly founded, the claim as free inhabitants of ancient tenements in the borough. There is no doubt that this claim is set up—not in respect of the ancient tenements in the borough, whatever they may be—but in respect of the inhabitants of the borough, and the learned counsel for the defendants said that this was a somewhat analogous right to that which exists in the free tenants on this manor which would be generally a prescription in a que estate. It appears to me to have no resemblance to it. First of all it is set up—not in respect of the tenements in any way, not as in respect of any holding, not as in respect of a que estate, which for several reasons could not well be set up here, but—in respect of inhabitancy. Therefore, the only mode in which the claim could be shaped is the mode in which a similar claim was set up in the case of *Lord*

Rivers v. *Adams* (1), and the Court is asked to presume an original Crown grant; that is to say, that the Crown might originally before Magna Charta have granted such rights as these by a Crown grant incorporating the inhabitants of the borough. That very question was dealt with under closely analogous circumstances in the case of *Lord Rivers* v. *Adams*. (1) It was, I believe, set up for the first time there as far as regards its being set up and supported only by immemorial user, that is to say, by a primâ facie amount of user, upon which the Court was asked to presume that the user was immemorial because no origin could have been shown for it. The case of *Lord Rivers* v. *Adams* (1) decided that "A right claimed by the inhabitants of a parish to cut and carry away for use as fuel in their own houses fagots or haskets of the underwood growing upon a common belonging to the lord of the manor is a right to a profit à prendre in the soil of another. Such a right, therefore, cannot exist by custom, prescription, or grant, unless it be a Crown grant which incorporates the inhabitants. Such a Crown grant will not be presumed from proof of user by inhabitants if the presumption is inconsistent with the past and existing state of things, and there is no trace of such a corporation having existed at any time." Here there is a far stronger inconsistency, a far greater antagonism, to use the language of the marginal note in the report, between the case set up on behalf of the defendants and the case set up of continuing Crown grant to the corporation, which when fairly read, to my mind, appear inconsistent with a claim merely founded upon a user set up by the defendants. Moreover there is in this case, as in *Lord Rivers* v. *Adams* (1), no trace of such a corporation as the inhabitants of the borough of Saltash, or the inhabitants of the ancient tenements within the borough having been incorporated by royal charter. Then it goes on: "Such a presumption would, moreover, be wholly unreasonable in a case where, at a time when the corporation was supposed to be in existence and entitled to the right, the tenants of the manor were exercising inconsistent rights and asserting their entire control over the underwood." That again is very much like the present case. There the tenants of the manor, who had the right as ancient tenants of the manor, were exercising

(1) 3 Ex. D. 361.

1880

MAYOR OF SALTASH v. GOODMAN.

GROVE, J.

rights inconsistent with the rights of the supposed claimants, all the claimants having done, according to their own account, being to cut these baskets of fagots from time immemorial, and there was nothing more than that user being set up. Then the headnote goes on to say: "The user must be connected with the right claimed. A prescriptive right to cut underwood in respect of a particular house is not established by proof of user when the only evidence is that the right was exercised in respect of the inhabitants generally." So here I may apply those words literally, a prescriptive right to fish in respect of an ancient tenement is not established by proof of user when the only evidence is that the right was exercised in respect of the inhabitants of the parish generally, for nothing is shewn in the evidence here about the ancient tenements, and in fact it does not at all shew what are ancient tenements. Ancient tenements, as far as we can judge, merely were old tenements—old houses or land—although land of course must always be old. It is true we find in the case that the free inhabitants of ancient tenements, whoever they may be, had apparently as such inhabitants exercised their privilege of dredging for oysters from time immemorial; but the privilege is not set forth in the case as being claimed in respect of the ancient tenements, but is undoubtedly claimed in respect of the inhabitancy.

In *Lord Rivers* v. *Adams* (1) the Lord Chief Baron, in giving the judgment of the Court, which consisted of himself, Cleasby and Pollock, BB., says: "If such a right could be claimed by custom there is evidence of user which, coupled with the evidence of reputation, might raise a question whether the custom did not exist. But the right claimed is a profit à prendre in the soil of another, and the authorities are uniform from *Gateward's Case* (2) to *Chilton* v. *Corporation of London* (3) that such a custom is bad in law." Then he goes through the cases, and farther on there is a portion of the judgment which I think so directly applies to this case that it is well to quote it. "The case, therefore, stands thus. We are called upon to say, because there has been user in the inhabitants individually of this right, not that there has been merely a grant to the same persons who exercise the right (which

(1) 3 Ex. D. at p. 363. (2) 6 Rep. 59 b.
(3) 7 Ch. D. 735.

would be the proper inference in ordinary cases, without regard to the probability of its actually taking place, but which would in this case be inoperative), but that there has been a grant in such a form as to make them into a body corporate having perpetual succession. It appears to us that we ought not to make this presumption, not because it is improbable, but because it is inconsistent with the past and existing state of things. We are to presume that a corporation has been formed many hundreds of years ago, when there is no trace at any time of its having ever existed. If the inhabitants had held meetings in reference to this right, or appointed any officer to look to the right, or done any act collectively of that description, the case would be different. We should then have the inhabitants acting in a corporate capacity in reference to this right, and from their doing so, and from their existence de facto as a corporation, we might according to the ordinary rule find a legal origin by a grant from the Crown; but to say that a corporation was created, which has never existed, would be carrying the fiction of a grant farther than has ever been done, or than is consistent with reason. And the presumption is made wholly unreasonable when we have, as in the present case, while the supposed corporation is existing and entitled to take the haskets, another body actually existing and legally existing, viz., the tenants of the manor, who are exercising inconsistent rights and publicly asserting their entire control over the underwood on the common. There is also another reason against making this presumption, which was strongly and properly pressed by the learned counsel for the plaintiff, and which is not applicable to any of the cases in which similar presumptions have been made, viz., that we are asked to presume the action of the Crown in favour of a right in the inhabitants, which could not exist as a custom, because it is unreasonable and contrary to law, and that the Crown, because this could not be done otherwise, got over the difficulty several hundred years ago by making them into a corporation. We cannot make this presumption, not because it is improbable, but because it is most unreasonable." Every word of that applies, and literally might have been pronounced as the judgment in the present case. It seems to me that case is completely in point, the sole difference

1880

MAYOR OF SALTASH v. GOODMAN.

Grove, J.

being that in the one case the right claimed was to cut fagots, and in the present case the right claimed is to dredge oysters. As regards the point upon which the judgment turned, that case is absolutely ad idem. Upon that authority, and also upon the reason of that authority, I am of opinion that there is no evidence on which the Court here could presume an incorporation of the inhabitants of ancient tenements, whatever those are, to set up the fiction, as it is called in *Lord Rivers* v. *Adams* (1), of a Crown grant.

Then it is contended on behalf of the plaintiffs in this case, and I think with great reason, that this presumption is unreasonable upon the ground that it is utterly destructive of the subject-matter, because the prescription is—although limited as to time—for these ancient inhabitants, or the inhabitants of the borough, or the inhabitants of the ancient tenements, or the subjects of the realm, to take oysters without stint for sale or otherwise. It may be that there are oyster fisheries like other fisheries from which the fish may be taken without stint, and yet without its being destructive of the total corpus or subject-matter of the grant or user, at all events, in any reasonable time to be contemplated humanly speaking. There may be oyster fisheries on the margin of the sea which go deep into the sea, and are renewed by the young oysters—the spat—coming from a deeper place than those which are open to a fishery, so as to renew them year by year, just as a salmon fishery or any other fishery might be renewed. But, on the other hand, there may be fisheries, and particularly oyster fisheries in the bed of a navigable river, which must be limited in extent, and may be destroyed by taking the fish without stint.

It does not matter that the right can only be exercised for a limited time in the year, for if all the ancient inhabitants, and all the subjects of the realm can go and fish and dredge these oysters for a month it would be highly probable that the oyster bed would be utterly destroyed. We do not require to speculate upon this, because there is a positive finding of fact in the case that "The said user does in fact tend to destruction of the said oyster fishery, and if continued will destroy the same." It has been decided in

(1) 3 Ex. D. 361.

several cases that where an alleged right is such as would utterly destroy the subject-matter of the right, it is bad and cannot be supported in law. In *Attorney-General* v. *Mathias* (1), a leading case on the subject, the Court held that a right to carry away the soil of another without stint cannot be claimed by prescription, nor can the claim be sustained by evidence of a lost grant. So again in *Bland* v. *Lipscombe*, a case cited in a note to *Race* v. *Ward* (2), Lord Campbell says, "We must act upon that salutary law which distinguishes between a mere easement and the right to take a profit. It is a good custom for all the inhabitants of a parish to dance in a particular spot, or the like; but a custom to take as a profit what is valuable would be very injurious to the owner and of but little benefit to the inhabitants, and is bad. Such being the settled law we are to apply it to this case. It is clear to me that the custom claimed on this plea is to angle for, catch, and carry away the fish; but supposing it were limited, as Mr. Brown argues, to a claim to angle for and catch the fish, without claiming a right to carry them away, I think it would be equally destructive of the subject-matter, and bad." In that case, which is not given in full, it is rather assumed, I think, by Lord Campbell, that it is such an angling and carrying away as would be destructive of the subject-matter. I do not take the note to go the length of saying there may be no right to fish at law established, but not such a right as is found to be destructive of the subject-matter. There it is found to be destructive of the subject-matter, and is therefore in my judgment bad. The last words of Lord Denman's judgment in *Mayor of Maldon* v. *Woolvet* (3) rather go to the same extent. That case turned mainly upon the statutes of Richard II., for the preservation of fish, and the defendant justified an entry by taking oyster spawn in the locus in quo. At the end of the judgment Lord Denman says, "To remove it is unlawful within the statutes of Richard II., which have never been repealed, but frequently recognised; and the immemorial usage cannot have legal existence." An immemorial usage was set up there. The defendants set up a right in the subjects to take the oyster spawn, but Lord

(1) 27 L. J. (Ch.) 761. (2) 4 E. & B. at p. 713.
(3) 12 Ad. & E. 13.

1880

MAYOR OF SALTASH v. GOODMAN.

Grove, J.

Denman may, I think, be taken to have said that they cannot do so within the statute of Richard II., and though the immemorial user was set up it cannot have a legal existence. I am unable to read the words in any other sense. However, upon the other authorities there is ample evidence that a right claimed, and claimed only by immemorial user, when that user is destructive of the subject-matter cannot be set up, and a legal existence of that which would be destructive of the subject-matter of the grant, supposed through the presumption of prescription to have a legal origin from the the Crown, cannot be presumed.

With the claim, as free inhabitants of the borough, I have virtually dealt in considering the question of the free inhabitants of the ancient tenements. It was not argued before us, but I must advert to it because a question is asked with reference to it.

Upon the whole, therefore, I answer all the three questions as to the defendants' alleged title negatively. I have already said that the plaintiffs have made out a primâ facie title, I now say that in my opinion the defendants have made out no title as against that which will enable them to sustain the privilege which they claim.

There is one point that I will deal with which was insisted upon throughout the arguments of the learned counsel for the defence, and that is that the Court will make any presumption in favour of immemorial user. The case of *Lord Rivers* v. *Adams* (1) shews the Courts will not go to that length. No doubt the Courts will go very far in presuming lawful origin where there has been immemorial user, but where the nature of the thing claimed is itself destructive of the subject-matter, and where it is antagonistic to other dominant claims with which it comes in conflict, or where there are other reasons which interfere and shew that the immemorial user cannot possibly point to that which alone makes it good in law, the Courts will not presume an alleged lost grant. It was said, and it was a very good argument, possibly one of the best addressed to us in this case, that it is primâ facie singular and inconsistent that the persons in the position of the defendants should have gone on taking oysters from time immemorial, as the case finds, if there was no immemo-

(1) 3 Ex. D. 361.

rial prescription and no legal right. That argument was used also in *Lord Rivers* v. *Adams* (1), and the Court said the taking may have gone on because those who were opposed to it, knowing it could not grow into a right, may not have troubled to interfere with it. That is perhaps a legal mode of reasoning, and of meeting the point. I am inclined to think, practically viewed, quite apart from technical law reasoning, the real fact was that both in this case and in *Lord Rivers* v. *Adams* (1) poor people were allowed to dredge oysters when they liked, while oysters were, like cockles, mussels, and such things, not of much value. Poor people inhabiting cottages on the banks of the river, which cottages may possibly have been the ancient tenements spoken of, were allowed to take the oysters and shell fish adhering to the bottom of the river and the stones left uncovered by the water at low water, much as they liked; but when on the other hand oysters became scarcer and of great value, and when, moreover, there was a high probability, if not, as found in this case, an absolute certainly, of the whole oyster fishery being destroyed, then the mayor and corporation of Saltash sought to interfere. On the whole I am of opinion that the plaintiffs, the corporation have made out their case, and that they are entitled to the judgment of the Court.

DENMAN, J. The plaintiffs' claim is for a several oyster fishery in parts of the Thamer. The defendants first deny any such right and claim as subjects of the realm to take oysters for sale without stint. This they might of course do, if the plaintiffs have no several fishery, subject to any statute which might be applicable to the case. The river Thamer being as found by the case, a tidal navigable river, or arm of the sea, it is therefore clear that the plaintiffs cannot have a several fishery except one granted before Magna Charta, but where the evidence shews immemorial enjoyment of all the incidents of a several fishery, a grant before Magna Charta (i.e., the proper legal origin), ought to be presumed. In this case, I think that the evidence gathered from the charters being all confirmation charters, coupled with the usage, is irresistible evidence of a

(1) 3 Ex. D. 361.

1880

MAYOR OF SALTASH v. GOODMAN.

Denman, J.

several oyster fishery. It was hardly contested that in the absence of the finding in paragraph 9 of the case, there is ample evidence of a several fishery at one time; but it was argued that the fishery is gone because admitting there was a grant of it, it was surrendered in the 35th year of the reign of Charles II. and could not be regranted. I think that such is not the effect of what has happened in this case. [The learned judge referred to the charter.]

Looking at the manner in which this charter originated, and at its object and scope as shewn on the face of it, it appears to me that it is impossible to say that at any given moment of time the several right of fishery ceased to exist. The acceptance of the surrender by the Crown and the re-grant to the corporation, are contemporaneous acts. In such a case I can find no authority for saying that the right is gone. In the case of forfeiture or resumption by the Crown of a several fishery it was held in the *Duke of Northumberland* v. *Houghton* (1), by Martin, and Pigott, BB., assenting, and Kelly, C.B., not dissenting, that there would be no merger. The evidence is very strong in the present case to shew that the right continued to be acted upon down to and subsequent to the last charter of 14 Geo. III. The leases set out in the case of the sole privilege of dredging oysters are wholly irreconcilable with a cessation of the right at any time.

It appears to me quite clear, that the charter of 35 Charles II., was not intended to resume and had not the effect of resuming possession for a single moment of the right of fishery vested in the corporation, but merely to continue and confirm to the corporation, notwithstanding the doubts which had arisen as to the due election of the officers, the same franchises, including the several fishery which the corporation then possessed.

I have therefore no hesitation in coming to the conclusion that the plaintiffs have made out their case to a several fishery continuously enjoyed without interruption in such a way as to call upon the Court to presume a legal origin, i.e., a grant before the time of Magna Charta, in the absence of anything to displace such presumption.

Then if there was a several oyster fishery in the plaintiffs, the

(1) Law Rep. 5 Ex. 127.

right of the public as such, and therefore of the defendants as subjects of the realm, to fish and take oysters without stint, which is relied upon by the defendants, cannot exist. It would be wholly inconsistent with a several (i.e., sole and exclusive) oyster fishery in the plaintiffs, and it would be destructive of the several oyster fishery. Mr. Mackenzie in his able argument was obliged to admit that he could not rely upon the right of the public without relying upon it to that extent. In fact he used it as an argument only against the existence of such a several fishery at all.

But the defendants mainly relied upon the right described in paragraph 9 of the case, stating that "the free inhabitants of ancient tenements in the borough of Saltash, have from time immemorial and without interruption, and claiming as of right exercised the privilege of dredging for oysters in the locus in quo mentioned in the statement of claim, from the 2nd day of February in each year to Easter Eve in each year, both inclusive, and of catching and carrying away the same without stint for sale or otherwise. The acts complained of were done in exercise of the privilege." The case finds such a usage to have existed from time immemorial. I assent to the propositions so forcibly enlarged upon by Willes, J., in *Johnson* v. *Barnes* (1), that we are bound to presume legal origin if possible for the usage so found; but the real question is whether such a user as that here stated can properly have had any legal origin. I must, however, here say that I quite assent to the qualification suggested by my Brother Grove, and that when the word "possible" is used it must be considered to mean reasonable.

The defendants' claim is, first, as free inhabitants of the borough, and secondly, as free inhabitants of ancient tenements in the borough, to dredge for oysters from the 2nd of February to Easter Eve inclusive, and to carry away the oysters without stint for sale or otherwise.

Such a claim appears to me to be one which, although I should have every desire to support it on the ground that it is found to have been exercised immemorially and without interruption, cannot be supported in law. It cannot be claimed by prescription, because

(1) Law Rep. 7 C. P. 592, at p. 604.

1880

MAYOR OF SALTASH v. GOODMAN.

Denman, J.

those in whose right it is said to exist are a fluctuating body. The free inhabitants or free inhabitants of ancient tenements must be as transitory and uncertain a body as the inhabitants of ancient messuages in *Gateward's Case* (1), or as the several persons who set up the right in many of the cases upon the subject. It cannot be set up by custom because it is a profit in alieno solo: *Constable* v. *Nicholson* (2), *Chilton* v. *Corporation of London* (3), and other cases.

It is suggested that the Court may, in order to support the immemorial usage in this case, presume a lost royal grant incorporating the body in whom this custom is said to exist for the purpose of doing the very acts mentioned in paragraph 9, as having been immemorially done. This is undoubtedly a very ingenious suggestion, but the presumption would certainly be a most violent one. A similar attempt was made in *Lord Rivers* v. *Adams* (4), but the Court held that such a presumption ought not to be made if inconsistent with the past and existing state of things. In the present case, in order to suppose such an origin to the usage, we should have to make a presumption to the last degree in conflict with the whole history of the fishery so far as we can gather it. There is no indication of any corporate act ever having been done by the persons of whom the supposed corporation must, if it existed, be composed. The very right claimed is one violently in antagonism with the several fishery of which we think there is so strong a primâ facie case. It is a far more improbable supposition than that which was rejected in *Lord Rivers* v. *Adams* (4), because in that case the fagots to be got were not to be sold or used out of the parish, whereas in the present case the right claimed is to get oysters for sale anywhere without stint, even though it tends to the destruction of a several oyster fishery, granted before Magna Charta to an existing corporation. The very statement of the purposes for which such an incorporation would have to be presumed according to the test given in *Constable* v. *Nicholson* (2), appears to me to be fatal to our drawing such a conclusion. It would be a purpose wholly unreasonable, and in derogation of rights clearly established as existing in others. Considering that

(1) 6 Rep. 59.
(2) 32 L. J. (C.P.) 240.
(3) 7 Ch. D. 735.
(4) 3 Ex. D. 361.

1880

MAYOR OF SALTASH v. GOODMAN.

Denman, J.

the right claimed is one which cannot be claimed either by custom or prescription, I think that we should be by no means justified in presuming so improbable a thing as an incorporation of the persons in whom this right is set up. I can draw no such inference from the facts. On the contrary, I think it wholly inconsistent with the facts proved. I therefore agree that our judgment ought to be for the plaintiffs.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *N. Bennett.*
Solicitors for defendants: *Wedlake & Letts.*

[IN THE COURT OF APPEAL.]

June 30.

SULLIVAN *v.* MITCALFE AND OTHERS.

Company—Prospectus—Concealment of Contract—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

17 Ch D. 315.

B. and C., being possessed of a patent, agreed to sell it to a company for 56,000*l.*, but by a series of contracts it was arranged that only 2000*l.* out of that sum should be retained by them for their own use, and that 54,000*l.* should be divided between the promoters of the company. The prospectus, issued on behalf of the company, did not mention the contracts relating to the disposal of the purchase-money of the patent. The defendants were promoters and directors of the company. The plaintiff subscribed for shares, but he afterwards sued the defendants to recover the price of the shares subscribed for by him:—

Held, upon demurrer, by Baggallay and Thesiger, L.JJ. (Bramwell, L.J., dissenting), that the contracts as to the disposal of the purchase-money of the patent ought to have been specified in the prospectus pursuant to the Companies Act, 1867, s. 38, and that the defendants were liable to the plaintiff for the price of his shares.

Gover's Case (1 Ch. D. 182) and *Twycross* v. *Grant* (2 C. P. D. 469) discussed.

APPEALS of the defendants, Peele and Brown, from orders of Grove, J., overruling demurrers.

The allegations contained in the statement of claim and the arguments are sufficiently set forth in the judgments of the Lords Justices.

1880

SULLIVAN v. MITCALFE.

Feb. 19. *Collins, Q.C.*, and *Seward Brice*, for the plaintiff.
Harrison, Q.C., and *Bray*, for the defendant Peele.
Talfourd Salter, Q.C., for the defendant Brown.

Cur. adv. vult.

June 30. The following judgments were delivered.

THESIGER, L.J. (1) This appeal raises the question whether upon demurrer certain contracts set forth in a statement of claim ought or ought not to be held to come within s. 38 of the Companies Act, 1867. (2)

Shortly stated, the contracts compose a series of arrangements made by parties to the formation of a joint stock company, and having for their object its formation. They are contracts, from which, when disclosed, it would be reasonably inferred, that what was purchased by the company when formed was of far less value than the sum which was actually paid by the company for it, that the company's capital had been or was to be expended principally in indirect payments to the promoters of the company and persons connected with them other than the real vendors to the company, and but little in the real bonâ fide purchase of that which was to constitute the subject of the company's business, that some at least of the persons who, by prospectus invited the public to take shares in the company, held such a position in regard to its formation and in connection with the vendors and promoters as to make their interests and the interests of ordinary subscribers for shares in the company by no means the same, and, finally, that the company itself was one in which no prudent man with knowledge of these facts, and trusting to the success of the undertaking alone, would be likely to embark his money in shares. On the

(1) This judgment was read by Baggallay, L.J.

(2) By the Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38, "Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

other hand, assuming the company formed, and the purchase, which was the object of its formation, carried out, there was nothing in any of the contracts other than the one which was in fact disclosed, which bound or directly affected the company or its property, nothing which by adoption or otherwise could impose any burden or obligation, any loss or liability upon it, nothing which made the value of its shares intrinsically greater or less. Under these circumstances we are brought face to face with two opposing views of the meaning of the section to be construed. The one, shortly expressed by Bramwell, L.J., in *Twycross* v. *Grant* (1), to the effect that only those contracts are meant "which affect the company, which put an obligation on it, whether with or without some benefit attached," and again "contracts binding on the company or contracts which they have power to reject," and expanded by Kelly, C.B., in his judgment in the same case at p. 506, where he says "that a contract to be within the provision must have been made with the company if it has been formed, and if not, with the promoters or the directors or the trustees, representing or purporting to act on behalf of the future company, and with the intent that the company when formed shall execute a corresponding contract, and so in effect ratify the act done by the promoters or other body of persons mentioned before its formation; also that it must be such as to impose, or be intended to impose a burden, or obligation, or a loss, or a liability upon the company, which would affect the value of the shares in the hands of a purchaser." The other view is stated by Brett, L.J., in *Gover's Case* (2), in the following terms: "I come to the conclusion that it," s. 38, "includes every contract made before the issue of the prospectus, the knowledge of which might have an effect upon a reasonable subscriber for shares in determining him to give or withhold faith in the promoter, director, or trustee issuing the prospectus, whether such contract was made by such promoter, director, or trustee before or after he became a promoter, director, or trustee, and whether or not such contract was made on behalf of, or so as if adopted to impose a liability on, the company." The arguments for and against these opposing views have been so elaborately set forth and discussed in the judgments in *Twycross*

(1) 2 C. P. D. 469, 497, 499.

(2) 1 Ch. D. 182, 200.

1880

SULLIVAN v. MITCALFE.

Thesiger, L.J.

v. *Grant* (1), both in the Common Pleas Division and in the Court of Appeal, that it would serve no useful purpose if I were to recapitulate them. I shall content myself by stating generally the grounds, upon which I feel myself compelled to adopt a wider construction of the section than that which the former of the two views allows.

I am not myself much impressed by the argument founded upon a presumption of the mischief for which the section was intended to provide a remedy, not because I do not accede to the principle, to adopt the language of Brett, L.J., in *Gover's Case* (2), that the enactments being remedial must be so construed as to give the most complete remedy which the phraseology will permit, but because there appears to me to be considerable uncertainty as to what was the particular mischief for which the enactment was intended to provide a remedy. No one can doubt that it was intended to give to persons invited by prospectuses or notices to become shareholders in companies some greater protection than they possessed before; but whether such protection was merely directed to prevent the concealment from such persons of contracts of the description of that, which was concealed in the well known case of Overend, Gurney & Co., Limited, a contract which had a most direct and most material bearing upon the position of the company and the value of its shares; or whether it was intended to enforce also the disclosure of all the arrangements preceding the formation of a company made by the parties concerned in its formation, whether they directly affect the position of the company or not, is a matter which from no source properly open to us can be satisfactorily solved. In this state of circumstances any à priori argument drawn from the supposed intention of the legislature is as likely to mislead as to assist. What particular contracts are or are not comprised in the enactment, and what are the conditions under which they are or need not to be disclosed, are questions which fall to be determined upon the language of the enactment itself, with no other guide for its construction than is afforded by the admitted general intention of the legislature and the ordinary rules, which govern the Courts in the interpretation of statutes and written instruments.

(1) 2 C. P. D. 469. (2) 1 Ch. D. 182, 200.

The heading of the two sections, of which s. 38 is one, has been sometimes relied on by those who support the more limited meaning of the term "contracts" used in s. 38, but the argument derived from it is, in my opinion, at best so slight as to be practically worthless.

As regards the section itself, this much must be admitted, as it has been either in express terms or impliedly by every judge who has had to consider the meaning of the section, viz., that the words "contract entered into by the company or the promoters, directors, or trustees thereof" are so general that they must necessarily receive some qualification. Starting then with this premise, I must confess that from the mere language of the section any more than from the presumed intention of the legislature, I cannot collect with any sufficient certainty what that qualification is. As a mere matter of interpretation unaffected by any rule of construction, the section appears to me capable of being read in such a manner as to bear either the wider or the narrower interpretation which has been put upon it, and the arguments in favour of the one and the other interpretation appear to me almost equally balanced. Under such circumstances, even if there were no rule of construction guiding me to the same result, I should feel myself compelled by the preponderating weight of judicial authority, which, putting aside *Gover's Case* (1) which is claimed by the advocates of both interpretations, is to be found in favour of the wider interpretation in *Cornell* v. *Hay* (2), in *Charlton* v. *Hay* (3), and in *Twycross* v. *Grant*. (4) But independently of authority, and assuming the language of the section to be as uncertain as I have stated that in my opinion it is, I feel equally bound to adopt the wider interpretation, upon what I think ought to be adopted as a rule of construction in such a case, viz., that when from the nature of the provision contained in an Act of Parliament it is clear that a restriction must be put upon the ordinary and literal signification of some word or expression, and it is uncertain from anything to be found in the Act itself, or in the circumstances judicially cognisable under which the provision was inserted, what the exact character and extent of that restriction

(1) 1 Ch. D. 182.
(2) Law Rep. 8 C. P. 328.
(3) 31 L. T. (N.S.) 437.
(4) 2 C. P. D. 469.

1880

SULLIVAN v. MITCALFE.

Thesiger, L.J.

is, it is the duty of the Courts to put no greater restriction than the nature of the provision and the subject-matter to which it relates necessarily impose. Applying this rule in its utmost strictness to the construction of the section in question, it might be said that all contracts must be disclosed in a prospectus inviting persons to take shares in a company, at the peril at least of an action if they are not, which relate to the formation of the company or to its capital, property, or business when formed, or to the position pecuniary or otherwise, in regard to the company or its promoters or vendors, of the directors or other officers of the company, provided that one of the parties to such contracts is a person who at its date or subsequently becomes a promoter, director, or trustee of the company. If it be urged against such a wide construction of the section that contracts wholly immaterial to be disclosed would thereby be brought within its provisions, the answer may be given that no consequence follows the omission to disclose in a prospectus any contract except in favour of a person taking shares on the faith of such prospectus, and that giving a reasonable meaning to this not very happily worded expression no person can be said to have taken shares on the faith of a prospectus except a person who can prove to the satisfaction of a jury that he took his shares on the faith of there being no such contract as that omitted to be disclosed, and that if such contract had been disclosed to him he would not have taken his shares. This is in substance the answer given to the objection by Cockburn, C.J., in *Twycross* v. *Grant* (1), and the practical effect of this view of the section would be, that a prospectus might with safety to those issuing it omit the mention of all contracts except such as might be reasonably said to be material to be known to persons invited to take shares in order to enable them to form a judgment as to the policy of so doing. But this view is no doubt open to the criticism that it supposes the legislature to have in the early part of the section directed the disclosure of contracts, which, if disclosed, would be so to no useful purpose, and if omitted to be disclosed would be so with impunity. I am, therefore, content to put the condition, which would otherwise attach only to the remedy for non-disclosure of a contract as a further limita-

(1) 2 C. P. D. 469, at p. 531.

tion or restriction upon the generality of the description of the contract itself, and to adopt the view that every contract relating to the formation of a company, or to its capital, property, or business when formed, or to the position, pecuniary or otherwise, in regard to the company, or its promoters or vendors, of the directors or other officers of the company, and which is material to be made known to persons invited to take shares in order to enable them to form a judgment as to the policy of so doing, is a contract within the meaning of s. 38 of the Companies Act, 1867, and as such must be disclosed under the circumstances and to the extent which the section points out, provided that one of the parties to it is at its date or subsequently becomes a promoter, director, or trustee of the company. I cannot, as a matter of law, and upon demurrer say that any of the contracts set out in the statement of claim are not such as may reasonably be found by a jury to come within this definition, and I am therefore of opinion that the judgment of Grove, J., overruling the demurrer was right, and should be affirmed.

BAGGALLAY, L.J. The substantial question which we have to determine upon the present appeal is, what contracts, or rather what classes of contracts, are within the provisions of the 38th section of the Companies Act of 1867. Upon this question there has been considerable difference of judicial opinion; and in the case of *Twycross* v. *Grant* (1), which is the only case in which the question has hitherto come directly under the consideration of the Court of Appeal, the judges then constituting the Court were equally divided in opinion. On the present occasion, the question is raised by demurrer, and consequently in the simplest possible form, as it is in no respect complicated by conflicting statements of fact; the allegations in the statement of claim must for the purposes of the appeal be assumed to be true.

The facts of the case, with which we have to deal, are as follows: the Diamond Fuel Company, Limited, was registered on the 27th of January, 1873, under the Companies Acts, 1862 and 1867, and thereupon a prospectus was issued by the defendants, other than the company, inviting the public to subscribe for shares. The

(1) 2 C. P. D. 469.

1880

SULLIVAN v. MITCALFE.

Baggallay, L.J.

prospectus so issued contained the following, amongst other statements: that the company was formed for the purpose of purchasing the patents of Mr. David Barker for improvements in the manufacture of artificial fuel and of acquiring and developing the works of such manufacture as then carried on by Messrs. Barker & Clare at Stratford, in Essex; that a provisional agreement had been entered into with the proprietors of the patents for the purchase of all their patent rights in the United Kingdom and abroad, together with the presses, works, machinery, plant, stock, &c., at Stratford, for the sum of 15,000*l.* in cash and 8200 fully paid-up shares of 5*l.* each; and that the only contract entered into was dated the 15th of November, 1872, and was between David Barker and Thomas Deykin Clare of the one part, and Francis Lambe Price, on behalf of the company, of the other part, which might be inspected at the office of the company. The contract so referred to was the provisional agreement mentioned in the prospectus, and was to the effect that the said Francis Lambe Price should purchase the patents as trustee for and on behalf of the company, and that the company should adopt such purchase immediately after its registration. The plaintiff subscribed for 200 shares in the company, and paid to the company the full amount thereof, namely, the sum of 1000*l.* On the 9th of September, 1878, he commenced the present action to recover the amount so paid by him, upon the ground that he took the shares on the faith of the prospectus issued by the defendants, and that such prospectus was as against him fraudulent within the intent and meaning of the 38th section of the Companies Act of 1867 by reason of certain contracts, which had been entered into by the promoters of the company before the issue of the prospectus, not being specified in it.

The more important allegations in the plaintiff's statement of claim are to the following effect: that the defendants, other than the company, issued the prospectus already referred to, and were at the time of such issue promoters and directors of the company; that although the amount made payable to Barker and Clare under the contract of the 15th of November, 1872, for the purchase of the patent was the sum of 56,000*l.*, 2000*l.* only of that sum was to be retained by them for their own benefit, and that

under a series of contracts entered into by the promoters and directors, which it is unnecessary now to specify in detail, the balance of 54,000*l.* was to be divided between all or some of the promoters of the company, and that at the time of issuing the prospectus the defendants were well aware that these contracts had been entered into and had omitted to specify them in the prospectus. The allegations are to some extent wanting in precision as to the parties between whom and in what proportions the 54,000*l.* were to be divided; but 3900*l.* are stated to have been paid to the defendant Mitcalfe and 5000*l.* to a person named Parry, and the remainder to have been divided between persons referred to as "the others of the said parties," which words, by reference to the 9th paragraph, indicate the persons mentioned in the previous paragraphs as having been engaged in forming and promoting the company, including all the defendants. What we have then to decide is, whether the contracts so omitted from the prospectus ought to have been specified in it.

The very general terms in which the 38th section of the Act of 1867 is expressed, have been the subject of comment by all the judges who have been called upon to consider it, and their opinions, as reported, have been for the most part introduced by observations to the effect that the language of the section is so general that it cannot be literally construed, and that some limitation must consequently be put upon it. In its earlier portion it directs that every prospectus of a company and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of any such prospectus or notice, whether subject to adoption by the directors or the company or otherwise; and the second portion of the section discloses the consequences which are to ensue if these directions are disobeyed. Now the words "any contract entered into by the company or the promoters, directors, or trustees thereof before the issue of the prospectus or notice," taken by themselves, are in every respect unlimited; but is not the necessary limitation to be found in the context? The contract referred to, whatever may be its limited meaning, is to be specified in every prospectus or notice

1880

SULLIVAN v. MITCALFE.

Baggallay, L.J.

issued for the purpose of inviting persons to subscribe for shares. Why should provision be made for its being specified in every prospectus or notice issued for this purpose, whilst no provision is made for its being specified in any prospectus or notice issued for any other purpose, unless it was the intention of the legislature to afford some protection to or to confer some benefit upon persons who might be likely to respond to the invitations so given to them? And if such was the intention of the legislature it is difficult to suggest any other class of contracts as being within its contemplation than such as, if made known to a person reading the prospectus or notice, would be likely to influence him in determining whether he would or would not become a shareholder in the projected company. Here, then, is at least a suggestion of the limitation which should be put upon the words "any contract."

But let us pass on to a consideration of the second portion of the section; it enacts that a prospectus or notice, which shall not specify any contract which by the first portion of the section is directed to be specified, shall be deemed fraudulent on the part of the promoters, directors, and officers of the company, knowingly issuing the same, as regards any person taking shares in the company on the faith of the prospectus, unless he shall have had notice of the omitted contract. Now it appears to me that, in this second portion of the section, there is the most marked confirmation of the view which I have mentioned as being suggested by the first, namely, that the legislature intended by its provisions to afford a substantial protection to persons who might be invited by a prospectus or notice to subscribe for shares; for having, in the first portion of the section, given directions which might or might not be obeyed, it has in the second provided that any omission to obey such directions shall be availed of, for their own benefit, by one class of persons only, namely, by persons who have taken shares in the company; and of such class by those only who have taken them upon the faith of the prospectus or notice from which the contract has been omitted, and who have had no notice of the contract from any other source; and this limitation of the class of shareholders who are to be entitled to the protection of the statutory provision has in my opinion an important bearing upon the construction to be put upon the section, for, if it was the

intention of the legislature to protect or indemnify a shareholder who had been misled by a prospectus or notice from which information to which he was entitled had been omitted, it must be assumed to have been equally its intention to exclude from the benefits of the enactment a shareholder who had not taken his shares on the faith of the prospectus or notice, or who having so taken them was at the time when he took them in possession from some other source of the information omitted from it. Upon the construction then of the language of the section, I am prepared to hold that every contract, which upon a reasonable construction of its purport and effect would assist a person in determining whether he would become a shareholder in the company, is a contract within the meaning of the 38th section of the Act of 1867; and having arrived at this conclusion from the considerations which I have mentioned, I abstain from saying more in support of it, as it is in accordance with the conclusions which have been arrived at by other judges, whose opinions upon the subject are to be found in the published reports. I more particularly refer to the judgment of Blackburn, J., in *Charlton* v. *Hay* (1), which was concurred in by Mellor and Field, JJ.; to the judgments of Mellish and Brett, L.JJ., in *Gover's Case* (2) (in which though the case was disposed of upon other grounds, opinions were expressed by the judges forming the Court upon the question now under consideration); to the judgment of the Common Pleas Division, as delivered by Lord Coleridge, C.J., in *Twycross* v. *Grant* (3), and to that of the Lord Chief Justice in the same case, when it came before the Court of Appeal. (4) With reference, however, to the judgment of Brett, L.J., in *Gover's Case* (2), I desire to say that whilst I entirely assent to the observations made by him as to the remedial character of the section and to the importance of construing it with regard to the state of the law as it existed at the time when it was enacted, I am unable to adopt the view intimated by him that the remedy of a shareholder who was entitled to the protection of the statute, was to have his name removed from the list of shareholders; as at present advised, it appears to me that the only remedy which a

(1) 31 L. T. (N.S.) 437.
(2) 1 Ch. D. 182.
(3) 2 C. P. D. 481.
(4) 2 C. P. D. 516.

1880

SULLIVAN v. MITCALFE.

Baggallay, L.J.

shareholder has under the statute is against the person or persons who have omitted to specify the contract.

That the language of the 38th section will admit of such a construction as that which in my opinion should be put upon it, is not disputed; but it is urged that a still more limited construction ought to be adopted, and that such contracts only should be treated as within the provisions of the section as are made, either by the company itself, or by its promoters, directors, or trustees, as representing or on behalf of it; in other words, such contracts only as affect the company in the sense of putting an obligation upon it. This view of the section was taken by Bramwell, L.J., in *Gover's Case* (1), and was concisely expressed by him in the following terms:—"There must be some limitation to the words used in the Act. That is conceded. It must be read as a contract entered into by the promoters as such;" and again in *Twycross* v. *Grant* (2) he expressed himself upon the same subject as follows:—"There must be some limitation; two have been suggested: one by the plaintiff, that every contract is meant which would assist a person in determining whether he would be a shareholder; the other, that only those contracts are meant which affect the company, which put an obligation upon it whether with or without some benefit attached. There may be other limitations better than either of them, but I think the choice lies between the two, and I am of opinion that the latter is right." The Lord Chief Baron expressed an opinion to the same effect in *Twycross* v. *Grant*. (2) In *Gover's Case* (1), Bramwell, L.J., expressed his views in the concise language I have mentioned without assigning any reason beyond a general concurrence in those which had been expressed in the same case by James, L.J., to which I will presently refer; but in *Twycross* v. *Grant* (2) he was apparently influenced by the consideration that it was enough to let the public know on what terms they could have the subject-matter of the scheme in which they were invited to join, and that it was better to leave people to look after themselves than to endeavour to protect them by affording them information which they would not take the trouble to ask for. Now I quite admit that, if a mine or a patent is offered for sale to a company, it is immaterial to state

(1) 1 Ch. D. 182. (2) 2 C. P. D. 469.

how or when or at what price the vendor acquired it, provided the vendor and the company or the purchaser representing the company, stand to each other in the ordinary relations of vendor and purchaser; if A. has acquired the mine or the patent from the owner at the price of 50,000*l.*, and has contracted to sell it to a company, or to a trustee for a company, for 100,000*l.*, there can be no objection to such a transaction, and in a prospectus or notice inviting the public to subscribe for shares, it would not in my opinion be necessary for the promoters or directors, if aware of the price given by A., to communicate that fact to those whom they might invite to subscribe; in such a case, the fair inference would be that the actual promoters of the company, by whatever name called, deemed 100,000*l.* a fair and reasonable price to be paid for the property agreed to be purchased and were willing to take their own share in the adventure, upon the same terms as those whom they were inviting to join with them: they may have been bad judges of the value of the property, or over-sanguine or careless, but of this the subscriber for shares must be assumed to know that he must take the risk: if he applies for them upon the faith of the prospectus, he is in no way deceived or misled; but the case is very different if by another contract between A. and the promoters of the company, the former agrees to return to the latter 40,000*l.* of the money to be paid to him in order that that amount may be divided amongst themselves; in this latter case, if the contract between A. and the promoters is concealed from the subscriber for shares, the latter is misled by the prospectus into believing that the promoters have agreed to give 100,000*l.* for the property, honestly though perhaps erroneously, believing it to be worth the price, and that they are running an equal risk with himself of the purchase turning out a bad bargain, whilst they are in fact preparing the way for putting into their own pockets a portion of the money, which they hope to induce him to contribute to the funds of the company. Surely for such scandalous transactions, and I can call them by no other name, and there have unfortunately been many of them, there was need of some more adequate remedy for the deceived shareholder than the existing law afforded: the language of the section is sufficient to give it; why should it receive a limited construction

1880

SULLIVAN v. MITCALFE.

Baggallay, L.J.

which would exclude it? To adopt the limited construction which has been pressed upon us would be to reduce the remedial character of the section to a minimum; the non-disclosure of a contract of so limited and restricted a character could hardly be considered as affording a sufficient reason for conferring upon a shareholder, and upon no one else, so great an amount of protection as the second portion of the section confers upon him, and at the same time refusing him the like protection when the effect of the contract is to confer upon the promoters a large amount of pecuniary benefit and to impose upon the company, and consequently upon all persons taking shares in it, a corresponding amount of loss.

It has been much pressed upon us in argument that the judgment of James, L.J., in *Gover's Case* (1) supports the contention of the appellants on the present appeal, and this appears to have been the view taken of it by Bramwell, L.J., in *Twycross* v. *Grant*. (2) So far as I can form an opinion of that judgment from the authorized report of it, it appears to me that, with the one exception to which I will presently allude, the Lord Justice did not intend to express any opinion beyond what the decision of the case then under consideration required. The circumstances of the case were peculiar; the appellant alleged that she had taken her shares upon the faith of a prospectus from which a contract entered into by a promoter had been improperly omitted, but the relief which she claimed was to have her name removed from the list of contributories: three of the four judges who constituted the Court held that if a contract which ought, under the provisions of the 38th section, to have been specified in the prospectus had been omitted, the relief to which the shareholder was entitled, was a personal remedy against those who had improperly issued the prospectus, and not to have his or her name removed from the list of shareholders or contributories: this was sufficient to dispose of the appeal, but two of the four judges, namely, James and Bramwell, L.JJ., also held, affirming in this respect the decision of the Vice-Chancellor, that the contract in question had not been entered into by a person who was at the date thereof a promoter, director, or trustee of the company,

(1) 1 Ch. D. 182. (2) 2 C. P. D. 469, at p. 501.

1880

SULLIVAN v. MITCALFE.

Baggallay, L.J.

and that there was consequently no necessity to specify it in the prospectus: from this conclusion the other two judges, Mellish and Brett, L.JJ., dissented. Now whether James, L.J., correctly estimated the effect of the evidence upon this part of the case, it is quite clear from the whole tenor of his judgment that it was based upon the estimate he had thus formed, for after stating that he was at a loss to understand upon what principle it could be said that the contract was by the company or by any promoter, trustee, or director of the company, and that the character of the contract could not operate as a transformation of the contracting parties, he added: "I may illustrate my view by referring to a contract which I think would be within the Act. If instead of contracting to sell to the company or inviting the company to become shareholders in the thing itself, Mappin had invited them to become shareholders with him in a contract and they had accepted that invitation, then he would by the terms of his offer and by their acceptance of that offer have made himself their agent as from the date of that contract, and any bye or collateral contract made for his own benefit would be a contract by a trustee for the company or partnership." Such being the opinion of the Lord Justice as to a class of contracts which would undoubtedly be within the provisions of the Act, I can hardly think that he would hesitate to hold that the contracts which are under consideration on the present appeal ought to have been specified in the prospectus.

I may add that the case of *Charlton* v. *Hay* (1), to which I have already alluded, and the circumstances of which are not distinguishable in principle from those of the present appeal, was cited in *Gover's Case* (2), and that no dissent was expressed either by James, L.J., or by Bramwell, L.J., from the judgment given by Blackburn, J., on behalf of himself and Mellor and Lush, JJ. In that case the contract in question was one by which the vendor to the company was to receive a portion only of the purchase-money, the residue being divided among the promoters; the Court held it to be within the section, and in the course of his judgment Blackburn, J., expressed himself in the following forcible terms: "We have to say whether this is a contract required to be

(1) 31 L. T. (N.S.) 437. (2) 1 Ch. D. 182.

1880

SULLIVAN v. MITCALFE.

Baggallay, L.J.

disclosed by the terms of the section; and it seems to me that not only is it clearly included in these terms, but further if it were not, the legislature has failed to express what was certainly its intention and object. This one of the alleged contracts is at all events of immense importance to all the shareholders of the company, and even if not subject to adoption by the directors or the company, it otherwise comes within the description of the contracts required to be specified." Every sentence in the passage which I have just quoted is, in my opinion, applicable to the present case. I in all respects adopt them, and am consequently of opinion that the demurrers of the defendants Peele and Brown were properly overruled by Grove, J., and that these appeals must be dismissed.

BRAMWELL, L.J. The opinion I expressed in *Twycross* v. *Grant* (1) I retain: I do so for the reasons on which I formed it. It is therefore not necessary to repeat them in detail; they may be summarised thus: the general words of s. 38 of the Companies Act, 1867, must have some restriction; in my opinion the language and reason of the thing shew that the contracts therein mentioned must be limited to those which bind the company, or which may be adopted or assumed by the company, and so affect it when formed: if it was intended that intending shareholders should be guided by information given in the prospectus as to the previous history of the company, its promoters, and the subject of its intended operations, no reason can be given why contracts only were to be stated. To ascertain what is the intention and meaning of the section it must be critically examined. It is as idle to attempt to put a meaning on it without doing this, as it would be to try to construe it without opening the book which contains it. Without such examination it is easy to talk of broad views on the one hand and of narrow on the other, to denounce promoters and their schemes, and when they are fraudulent and dishonest to express indignant opinions well deserved, but which might tell most harshly and unjustly on men against whom there was not the slightest ground of complaint that they had failed either in honesty or care for the interests of the intended future shareholders of the company. If this examination of the section is

(1) 2 C. P. D. 469.

hair-splitting, hairs must be split, otherwise injustice will be done, and this certainly is to be said in favour of the construction I contend for, that it is what the framers of the Act meant, as is well known. The doubt that has arisen as to the meaning of s. 38, has arisen from the addition of some words and the withdrawal of others not intended to alter the enactment on the matter in question, but which having been added and taken away without noticing the combined effects of so doing have raised the question to be answered.

But there are some arguments and judgments on the matter which I must examine. The last delivered is that of Cockburn, C.J., in *Twycross* v. *Grant.* (1) His Lordship speaks of the practices against which the action is directed, and the persons who resort to them, as sapping the funds through clandestine contracts with contractors who are subtle and insidious, and by whose insidious contrivances the exorbitant price is concealed; of clandestine arrangement, positive evil, &c. His Lordship thinks these are to be dealt with on broad grounds, with a beneficia application of the statute, no hair-splitting or minute verbal criticism. Now, no doubt, this is the popular view. But, however much one may be inclined to take it, one must take care not to be led away by one's just indignation, or injustice may be done and the law misinterpreted. We must refer to the statute. To quote his Lordship, he says (p. 527): "The question whether these contracts are within the 38th section is one of greater difficulty. It becomes necessary to consider the words of the enactment." So I thought and so I did. I cannot find that his Lordship has. Absolutely there is not a word of comment or criticism. He sets out the section indeed, but so far from discussing it, he says (p. 530): "If such a case as the present be not within the enactment, all I can say is that it ought to be." Really that is all he does say about the section, for he proceeds: "And I cannot allow myself to be led into splitting hairs, or entering into minute verbal criticism upon what I believe to be beneficial legislation." From which one would infer that it was necessary to consider the words without a verbal criticism, at least without a minute one. That being so, I might dismiss the further consideration of this

(1) 2 C. P. D. 469.

1880

SULLIVAN v. MITCALFE.

Bramwell, L.J.

judgment with the remark that what, with all due respect to his Lordship's reasons, I must call the governing error is the not distinguishing between contracts which affect or are to affect the company and those which do not and will not. Those which do not and will not are unimportant. If a builder is to build a house for me, the price he is to pay for bricks, wood, labour, &c., is to me immaterial. If such contracts are within the statute, then every contract made by Clarke & Co. in the *Lisbon Tramway Case* (1) ought to have been mentioned in the prospectus. But there are these passages in his Lordship's judgment which I must notice; he says (2): "We may, with perfect safety assume that the section is intended to apply to contracts relating to such companies alone. But when we have to deal with a contract undoubtedly having reference to a company, why are we to put any further restriction upon the operation of the statute?" Further restriction than what? That it relates or refers to the company. What is the meaning of a contract relating or referring to a company? But the reason for the restriction is the language of the section, and those considerations he does not deal with. It is asked what would a man say if he was told the owner of the concern, which this intended company was to purchase, was to be chairman and only to be paid by his buyer if he could get a contract from the board which was to be procured by the promoter who was to get a large sum of money for getting it, which however he was sure to do from the chairman and other directors, the first being interested to get his price, and the last knowing nothing about the business except what these interested parties thought fit to tell them. Certainly the last consideration would deter any man from having anything to do with any concern with such directors, but that is not in question here. As to the rest it depends upon the persons. Suppose the Duke of Devonshire had a mine; suppose Messrs. Baring promoted a company to take, and that such a man as the late Mr. Brassey, was the contractor, and all the other circumstances existed as above put: would any one be deterred? But the question is, what says the statute? The other passage is at 2 C. P. D., p. 538. I cannot understand it. "Mr. Grant cannot in any sense be said to have been a purchaser

(1) 2 C. P. D. 469. (2) 2 C. P. D. 529.

from the duke, or a vendor to the company. He carefully avoided assuming that relation." This is right. His Lordship proceeds: "His position was, though not ostensibly, yet actually, that of a promoter." This also seems right, except that I should have thought he was ostensibly a promoter. But this is immaterial. Now follows what I cannot understand. "Fully admitting that a person who sells to a company is no more bound to disclose how or upon what terms he acquired the subject-matter of the sale than an ordinary vendor to an ordinary purchaser, it seems to me that when the vendor adopts the character of a promoter, the matter assumes a very different aspect. . . . . If he proposes to derive advantage by selling to them at a profit, any contracts by which effect has been given to such purposes come within this protective enactment." Very likely; but if Grant was not a vendor, how did this apply to him? Of course I notice this to retain the advantage of the opinion expressed by James, L.J., in *Gover's Case.* (1)

I proceed to consider the judgment of Lord Coleridge, C.J., in *Twycross* v. *Grant.* (2) His Lordship says (3): "It is utterly immaterial to an ordinary purchaser to know what the vendor will do with the purchase-money when he gets it: the purchaser has no further interest in it. But an applicant for shares in a company is in a totally different position. His money becomes part of the capital of the company; and to him it is all important to know what sort of persons are to have the control of his money when he has paid it, and how that money is to be applied, whether upon the enterprise itself or in remunerating those who brought the company into existence." With great respect, I say, "No" as to the future of the company. If 10,000*l.* are paid for a mine, it matters not to the company where the 10,000*l.* go. No doubt, if it was known that the mine-owner was only to get 1000*l.*, it would influence intending shareholders, because it would shew what he thought was the real value. But the statute does not require his opinion to be stated, but only contracts. If it had been intended that things calculated to influence intending shareholders should be stated, it should have said so. What could have been more

(1) 1 Ch. D. 182. (2) 2 C. P. D. 469.
(3) 2 C. P. D. at p. 483.

1880

SULLIVAN v. MITCALFE.

Bramwell, L.J.

important than that a mine or patent had been worked for years without profit? Yet that need not be stated. If it should be said that we know that the section is the result of mistakes, and we know what was intended, so be it: such contracts as these are not included. If the section is to be construed as though what was said was meant, then I contend the same conclusion must be come to. His Lordship says most forcibly (1): "A statute passed to prevent fraud and couched in general language ought to be construed so as to defeat all the frauds which are within the mischief sought to be remedied." True, but the language of the statute must be looked to. It must be borne in mind that not all important things but contracts only are to be stated, and it must be remembered that if all a promoter's agreements are to be stated, then if a contractor is a promoter and has entered into provisional contracts for materials and labour, they must all be stated. My Brother Brett in *Gover's Case* (2), after shewing that before the statute other frauds or wrongs were provided for, says: "But for a mere non-disclosure, fraudulent or otherwise, there was no remedy either in law or equity for the invited subscriber if he became a shareholder." He proceeds: "One would expect a remedial enactment passed under such circumstances to cover the unprotected danger: that is to say, to insist on the disclosure of everything which might reasonably have an effect on the mind of an invited subscriber." This is logical and forcible. But if so, why did not the legislature say so? It has not said that everything should be stated, only that certain contracts should be. And it has not said that all contracts which would so affect the mind of the invited subscriber should be stated: only those entered into by the company or promoters, directors, and trustees thereof, whether subject to adoption or otherwise as the Lord Justice says. He then says that the statute extends to every contract made by a promoter before the issue of the prospectus, the knowledge of which might have an effect upon a reasonable subscriber for shares, whether such contracts were made before the promoter was a promoter or not. But with submission, there is no such limitation in the section as "contract, the knowledge of which might have an effect on a reasonable

(1) 2 C. P. D. 486. (2) 1 Ch. D. 182, at p. 199.

subscriber." It is clear that if the company had entered into a beneficial contract for the performance of works and it was not stated, the prospectus would be fraudulent within the statute. The truth is, my Brother Brett reads the statute with no limitation except one, not merely not in it (for none is), but for which there is no justification in it. I wish particularly to call attention to what Mellish, L.J., said in *Gover's Case* (1): "I think that the section ought to be held to extend to every contract made with a person who afterwards becomes a promoter or director, provided the company have become entitled to the benefit of the contract or liable to perform its provisions before the prospectus was issued." That is my opinion.

I now proceed to deal with some arguments that have been used. It is said that it is material that contracts should be made known to persons invited to take shares in order to enable them to form a judgment as to the policy of so doing. And certainly in *Twycross* v. *Grant* (2) it was left to the jury, and they found that the contracts there were material for this purpose. But with all submission their materiality is immaterial. The statute uses no such word, and has no such intention. Immaterial contracts must be stated as much as those material if they are within the section; and their materiality or immateriality has no bearing on the question of whether they are. The statute is not to "insure" full information as to all the material circumstances attending the formation of the company antecedently to the issue of the prospectus. It is to insure something which may or may not be material, while other things very material need not be mentioned. I agree if all the circumstances in this case, including the contracts in question, had been stated, reasonable people would have been deterred from taking shares. So they would, if they knew that the directors received their qualification from a vendor to the company, not a promoter; for it would be seen that such directors were risking nothing of their own, had been under no necessity to form an opinion as to the success of a scheme by which they might gain and could not lose, and were under a bias favourable to the vendor: yet this need not be stated, though positively fraudulent and exposing the directors to a liability to

(1) 1 Ch. D. 182, at p. 191. (2) 2 C. P. D. 469.

1880

SULLIVAN v. MITCALFE.

Bramwell, L.J.

the company for the value of the qualification. It is asked why, it being to the interest of the shareholders that such arrangements should not be kept secret, they are not within the section. The question is, why are they? And the answer is, because they are not, as would be seen by reading it. It might be very good legislation to say they should be. It is a mistake to say shareholders are affected by such contracts as the present. Intending shareholders might be influenced to consider whether they would become so, but the company is not affected thereby, and so not the shareholders. It is a mistake to say that such contracts involve the fortune of the future company, or the crippling of its resources, or the sapping of its funds. The mine, and its plant, are offered in working order at a fixed price. What in the name of common sense does it matter to the company when formed (not to the intending shareholder), how that is to be divided, among whom, and on what considerations by him who receives it? If the bargain is a good one for the company, if what they get is worth the money they give for it, how are they crippled, or sapped, or anything else, by the way the vendors got at the figures asked, and what they do with the money? Suppose in the *Lisbon Tramway Case* (1) the sums to Saldanha and Larmanjut were fair, that Grant had charged 50*l.* only, that there had been no rigging of the market, &c., and that the same price had been paid by the company as was paid: the contractors' profit being so much the more, would there have been any crippling or sapping? Would it have been possible to talk of the adequacy or inadequacy of the capital? "Here is the thing for you: privilege, tramway, locomotives, carriages, everything, at such a price: take it or leave it alone." If after paying that price, they have not capital left enough to work the line, it shews that their entire capital was too small at the outset. How is the company sapped or crippled by these arrangements any more than they are by a contract made by the contractors with a carriage-builder for the building at a certain price of the carriages he is to supply for the lump sum? I should be sorry to have it supposed that I was saying a word in favour of what took place in the Lisbon Tramway Company. I retain my opinion that the transactions were "nefarious." But I

(1) 2 C. P. D. 531.

say that the question for a company or any other buyer, where a thing is offered at a price, is, Is it worth that price? and that it matters not how the vendor has arrived at that price, and that the vendee is no more crippled and sapped when that price has been arrived at by one process than by another. No doubt directors might be liable if they gave an improper price, and no doubt intending shareholders if they knew the process by which it was arrived at might be influenced as to purchasing. The mistake is in confounding that which would reasonably influence an intending shareholder, with that which would affect the future prosperity of the company. It is said that if this restriction is to be put on the statute, the legislature might have put it. The obvious answer to which is that the legislature might have put any and has put none: therefore, if this is right, none must be put. But it is admitted some must be. It is no answer to the argument that if these contracts are to be stated, then all sub-contracts by a promoter or contractor must be, to say that the shareholder must, to have any claim, take his shares on the faith of the prospectus. He does so take them. He does not take them on the faith that there is no sub-contract, but he takes on the faith of the prospectus. That is made fraudulent by the statute, if it does not mention the contracts the statute says shall be mentioned: per Cockburn, C.J. (1) The result is this. The shareholders take on the faith of the prospectus. The promoter has with perfect honesty omitted a contract, which according to the statute should have been inserted in it, a contract wholly immaterial or even one which might have induced the shareholder to take shares, e.g., an advantageous contract with a respectable man for executing the works, the statute makes the prospectus fraudulent and the shareholder has a cause of action. It is no answer then to say that the contract omitted is immaterial to the formation of an opinion as to the prospects of the company. It is, if I may be pardoned the word, ingeniously suggested by Thesiger, L.J., that a limitation or qualification must be put on the words "take on the faith of the prospectus," and that they must be read "take on the faith that there was no contract which, if set out, would have deterred him from taking." That would improve the statute and make the construction, the plaintiff contends for, more reason-

(1) 2 C. P. D. 469.

1880

SULLIVAN v. MITCALFE.

Bramwell, L.J.

able: but it would be, not the statute as it is, but the statute as amended.

On these considerations I have formed and retained the opinion above expressed. It remains to deal with the particular case before us. Leaving out the abusive part of the statement of facts in the claim, such as "scheme," "device," which is immaterial to the question we have to answer, the facts and contracts set forth are as follows: first, Barker was possessed of a patent: secondly, he assigned to Clare a half share of the patent for 600*l.*, which Clare, however, did not pay: thirdly, Barker and Clare agreed with Millward that Millward should join in promoting a company, and for that purpose mortgaged the patent to Millward, and by a subsequent indenture gave him license to use the patent. Millward, however, was paid off out of Barker and Clare's share of the purchase-money from the company, and a release given; but, it is said, the indentures of mortgage and license to Millward not being cancelled, remained an incumbrance on the company, which is very ingenious but unfounded: fourthly, Barker, Clare, and Millward arranged with the defendant Mitcalfe and four other persons, that the company should be formed to acquire the patent: fifthly, then it was agreed between Barker and Clare on the one hand, and Mitcalfe and the four others on the other, that Barker and Clare, as vendors, should be nominees of Mitcalfe, and the two of the four others, and that the consideration paid to Barker and Clare should, except a small sum, be paid to the defendants, that is all four, "particularly Mitcalfe," and the two of the four persons, that is to say, that the vendors should receive only a small part of the purchase-money, and the rest be divided among promoters and directors, including the four defendants: sixthly, another agreement between Barker and Clare on the one part, and Mitcalfe and two of the four on the other part, whereby reciting the former agreement they pretended to make arrangements as to the application and division of the purchase-money to be paid by the company: seventhly, this last agreement was a sham, the real agreement being one between "the *said several* persons" (whoever they may be), that out of the 15,000*l.* cash, and 8200 paid-up shares, Barker and Clare should receive only 2000*l.* cash, 3900*l.* should be paid to Mitcalfe, 5000*l.* to Parry, who is one of the two of the four, and the remainder of the sum of 15,000*l.* among the

others of the "said persons," whoever they may be; whether the four and the directors or not, does not appear: eighthly, then the formation of the company is mentioned, and the agreement of purchase between Barker, and Clare, and Price, who is one of the other two of the four, as trustee for the company for the purchase of the patent to be taken and adopted by the Diamond Company for 56,000*l.*—15,000*l.* in cash, the rest in paid-up shares. The statement of claim then sets forth the registering of the company, its objects, and the issuing by the defendants of a prospectus, mentioning none of these contracts except the last between Barker, Clare, and Price; that the defendants therefore issued a fraudulent prospectus within the statute. There is an alternative claim. The demurrer is to the claim founded on the statute.

Now it may very well be admitted that if these facts are true, a gross fraud has been perpetrated, and had they been known there would have been a difficulty in getting applicants for shares. Barker had the patent, could make no profitable use of it, granted half to Clare for 600*l.* who did not pay, the two mortgaged to Millward, and then a company was got up, the directors of which, or some of them, agreed that the company should give 56,000*l.* for this hitherto unprofitable and unsaleable patent, but bargain with the owners that they the owners shall only receive 2000*l.* out of the 56,000*l.*, the residue being divided among directors and promoters. No one in his senses would take a share, the company giving that sum under these circumstances. Further, if it is true that those directors got part of the purchase-money, it is certain that they did a most fraudulent thing and must refund to the company. But are these contracts within the section? Why should the contract between Barker and Clare be mentioned in the prospectus? If Barker gave the moiety as a gift, or sold it for any sum from one pound to a million, its value to the company is the same. No doubt the transaction shows what Barker thought it was worth in the sense of what it would fetch, but the statute does not say that Barker's opinion should be stated in the prospectus. It seems to me that so far from its being necessary to state this contract, the contention that it must be stated shows the unreasonableness of the construction the plaintiff puts on the statute. The contract is fulfilled and spent, yet is to be stated: so of the mortgage to Millward. If an estate was bought by a

1880

SULLIVAN v. MITCALFE.

Bramwell, L J.

company, would it be necessary to set out in the prospectus all the antecedent mortgages on it, though paid off? so of the other contracts, except that with Price. What does it matter to the company, how the consideration is divided? I am not now considering the alleged conduct of the directors in taking part of the purchase-money. For the purposes of the question before us that is immaterial. Then how does it concern the company that the vendors are content that they should get a trifle, and the agents should get the largest part of the price? Let me not be mistaken. If the directors gave 56,000*l.* or any other sum for this patent without inquiry as to its value or how the sum was arrived at, they grossly neglected their duty and are responsible. But that is not the question. The question is whether the agreements among vendors and their agents for the division of the price, or plunder if plunder it was, are contracts within the section. I say no. The company was neither richer nor poorer on account of the way the spoil was divided among the spoilers. It may have been a folly or dishonesty to give so much if the patent was not worth it; or if it was, it may have been a folly or necessity for the vendors to take so little: but either way, the company, I repeat, was neither richer nor poorer on account of the way the price agreed on was divided. The company was not affected by it, not bound, nor to be bound. Suppose the company went on for ten years prosperously, would it matter to it or its shareholders where the price had gone? If not ten years, would it matter if the company lasted prosperously a year or a week only? If not, would it matter if the company was unprosperous from the beginning? I am of opinion that the demurrer should be allowed. It is agreeable enough to speaker and listener to denounce and hear denounced delinquent promoters and directors, of whom unhappily there are too many. But care should be taken not to put a construction on the statute, unreasonable and impossible from its wideness, which on the failure of a perfectly honest company may work the grossest injustice on persons entirely honest and faithful to their duties.

Judgment affirmed.

Solicitor for plaintiff: *Edward Beall.*
Solicitor for defendant Peele: *F. W. Mount.*
Solicitor for defendant Brown: *H. A. Patience.*

[IN THE COURT OF APPEAL.]

1880
June 23.

BUDD AND ANOTHER *v.* MARSHALL.

Landlord and Tenant—Covenant by Tenant to pay "all Taxes, Rates, Duties, and Assessments"—Expense of repairing defective Drainage—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94, 95, 96, 98, 104.

The defendant was tenant to the plaintiffs of certain hereditaments under a lease, by which he was bound to "bear, pay, and discharge . . . all other taxes, rates, duties, and assessments whatsoever, whether parliamentary, parochial, or otherwise." The drainage having become defective, the sanitary authority of the borough within which the hereditaments were situate caused a notice to be served upon the plaintiffs requiring them, as owners, to abate the nuisance, and the notice not having been complied with, obtained an order from a justice to the like effect. The plaintiffs having executed the works necessary to enable them to obey the order, sought to recover the cost of them from the defendant under the foregoing covenant :—

Held, by Baggallay and Bramwell, L.JJ. (Brett, L.J., dissenting), that the action was maintainable.

ACTION to recover the cost of filling up a cesspool and draining the Portland Mews, Brighton, into a sewer.

By indenture of lease dated the 1st of July, 1868, to which the plaintiffs and the defendant were parties, certain stables, coach-houses, and premises known as Portland Mews, Brighton, were demised to the defendant for the term of twenty-one years from the 25th of December, 1867, determinable by the lessee at the end of the first seven or fourteen years, at the yearly rent of 230*l.* The lease contained covenants, that the lessee would pay the rent clear of all deductions for or in respect of the sewers rate or any other rates, taxes, duties, charges, and assessments whatsoever, whether parliamentary, parochial, or otherwise howsoever, except income tax on rent; and further, that the lessee would at all times bear, pay, and discharge the land tax (if any), sewers rate, borough rate, improvement rate, tithes, and tithe rent-charge in lieu of tithes, and all other taxes, rates, duties, and assessments whatsoever, whether parliamentary, parochial, or otherwise, which then were, or which at any time or times thereafter during the said term should be taxed, charged, rated, assessed, or imposed on the said premises or any part thereof, or upon the landlords or tenant in respect thereof, or in respect of the said yearly rent

1880

BUDD v. MARSHALL.

except as aforesaid. There was also a covenant by the lessee to repair.

In the summer of 1877, the lessors received a notice dated the 26th of May, under the Public Health Act, 1875, from the inspector of nuisances for the borough of Brighton, that there existed in or upon the stables and premises at Portland Mews the following nuisance, namely, "the premises so foul causing a leakage into the adjoining properties from want of being drained into the common sewer and all cesspools filled up, as to be a nuisance and injurious to health, and that such nuisance is caused or arises by your act, default, or sufferance." On the 13th of September, 1877, another notice to the like effect was issued, directed "To the owner of the stables," under the hand of the inspector of nuisances. This notice was received by F. S. Dixon one of the plaintiffs. This was followed by a notice dated the 21st of September, 1877, and signed by the town clerk, requiring the owners to drain the premises into the common sewer and fill up the cesspool to the satisfaction of the borough surveyor. At length F. S. Dixon was summoned to appear before the bench at Brighton, to answer to an information "for that he being the owner of certain premises situate and known as Portland Mews, St. George's Road, did cause such premises to become so foul from want of being drained into the common sewer and all cesspools filled up, as to be a nuisance and injurious to health." A justice of the peace made an order against Dixon alone for filling up the cesspool and for the proper construction of the drain within a month. The plaintiffs accordingly performed the necessary work, and brought the present action to recover the cost of it.

GROVE, J., gave judgment for the plaintiffs, and the defendant appealed.

June 8. *J. Brown, Q.C.*, and *Bremner*, for the plaintiffs.

Willis, Q.C., and *Finlay*, for the defendant.

The arguments and the authorities are sufficiently noticed in the judgments.

Cur. adv. vult.

June 23. The following judgments were delivered:—

BRETT, L.J. The question is, whether the defendant has bound

himself to reimburse the plaintiffs for a payment made by them, and the answer depends upon the construction of a covenant in the lease, under which the defendant as tenant holds the demised premises from the plaintiffs as landlords. The payment was made pursuant to the Public Health Act, 1875. I think that the proper course to be taken is first to construe the lease without the statute, and then to construe the statute without the lease, and, finally, to see what is the result of this mode of investigation. The authorities shew that this is the true method of determining the question.

As to the covenant, the tenant was bound to pay the rent clear of all "taxes, rates, duties, and assessments whatsoever, whether parliamentary, parochial, or otherwise." It has been urged that the word "duties" will include the liability of the landlords to make good the defective drainage: suppose that the Public Health Act, 1875, did not exist: several words precede "duties," which is capable of bearing a wider meaning than "rates" and "taxes;" nevertheless, as it follows them, it ought to be construed as having a similar interpretation. It seems to me that "duties" means payments, not acts to be performed; the "duty" is to be charged, rated, assessed, or imposed, not by the owner, but by some other persons; it is in the nature of a tax or rate. Suppose that the duty to serve upon juries had been imposed upon the owner instead of the occupier: would that be a duty which the tenant had bound himself to perform? This seems to me to be the true construction of the lease.

I will now consider the provisions of the Public Health Act, 1875. (1) By s. 94 of that Act an obligation is imposed upon the

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 94: On the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose: Provided—First. That where the nuisance arises from the want or defective construction of any structural convenience, or where there is no occupier of the premises, notice under this section shall be served on the owner. Secondly. That where the person causing the nuisance cannot be found, and it is clear that the nuisance does not

1880

BUDD v. MARSHALL.

Brett, L.J.

owner to abate a nuisance arising from the want or defective construction of any structural convenience, and to execute such works and do such things as may be necessary for that purpose. What is the obligation created by this enactment? It is an obligation to do an act and to execute works; it is an obligation which the owner might himself perform. If the obligation is not fulfilled,

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arise or continue by the act, default, or sufferance of the owner or occupier of the premises, the local authority may themselves abate the same without further order.

Sect. 95: If the person on whom a notice to abate a nuisance has been served makes default in complying with any of the requisitions thereof within the time specified, or if the nuisance, although abated since the service of the notice, is, in the opinion of the local authority, likely to recur on the same premises, the local authority shall cause a complaint relating to such nuisance to be made before a justice, and such justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction.

Sect. 96: If the Court is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, the Court shall make an order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose; or an order prohibiting the recurrence of the nuisance and directing the execution of any works necessary to prevent the recurrence; or an order both requiring abatement and prohibiting the recurrence of the nuisance.

The Court may by their order impose a penalty not exceeding five pounds on the person on whom the order is made, and shall also give directions as to the payment of all costs incurred up to the time of the hearing or making the order for abatement or prohibition of the nuisance.

Sect. 98: Any person not obeying an order to comply with the requisitions of the local authority or otherwise to abate the nuisance, shall, if he fails to satisfy the Court that he has used all due diligence to carry out such order, be liable to a penalty not exceeding ten shillings per day during his default; and any person knowingly and wilfully acting contrary to an order of prohibition shall be liable to a penalty not exceeding twenty shillings per day during such contrary action; moreover the local authority may enter the premises to which any order relates, and abate the nuisance, and do whatever may be necessary in execution of such order, and recover in a summary manner the expenses incurred by them from the person on whom the order is made.

Sect. 104: "Provided also, that nothing herein contained shall affect any contract between any owner or occupier of any house, building, or other property whereby it is or may be agreed that the occupier shall pay or discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord and tenant."

if the notice of the local authority is not complied with, an order may be obtained under s. 95 from a justice of the peace enforcing obedience to the notice. Under s. 98 the order of the justice may be enforced by a penalty, which a court of summary jurisdiction has power to impose; moreover, the local authority has power to abate the nuisance, and to enter upon the premises where it exists for that purpose, the expenses of so doing may be recovered from the owner in a summary manner. This was the course adopted in the present case. Does this mode of recovering the costs of the work fall within the words of the lease? It is not in the nature of a tax or rate, it is a mere account for executing the work. The obligation imposed by the notice of the local authority and by the order of the justice is different from the "duty" contemplated by the lease. It has been argued that the decisions shew that the construction which I adopt is too narrow; but in *Tidswell* v. *Whitworth* (1) the expense incurred by the owner was held to be in respect of a breach of duty imposed upon him by a statute, and it is clearly an authority in favour of the defendant. *Thompson* v. *Lapworth* (2) was also mentioned in the course of the argument; it is true that in that case the tenant was held liable, but the statute contemplated that the local authority should itself do the work; this makes the case distinguishable from that before us, and the reasoning of the judges does not apply. I will not go through all the cases which have been cited, but I may remark that the strongest case against my view is *Crosse* v. *Raw* (3); the decision, however, turned chiefly upon the word "outgoings," but this word is not used in the case before us. In construing deeds and other documents it must be supposed that the proper meaning of words is known to the parties, and that if they are omitted, they are omitted advisedly; it must, therefore, be assumed that by omitting the word "outgoing" the parties to the lease before us meant that the doctrine relied upon in *Crosse* v. *Raw* (3) should not apply to the contract of demise executed between them.

I am of opinion that judgment should be entered for the defendant.

BRAMWELL, L.J. The question is, whether the words used by

(1) Law Rep. 2 C. P. 326. (2) Law Rep. 3 C. P. 149.
(3) Law Rep. 9 Ex. 209.

1880

BUDD v. MARSHALL.

Bramwell, L.J.

the parties include a case, which was not foreseen at the time when the contract of demise was entered into. I have not a confident opinion on the subject, as Brett, L.J., differs; but I wish to state at length my view of the case before us.

The drainage upon the premises demised to the defendant was defective, and the local authority obtained an order from a justice of the peace that the nuisance should be abated; the plaintiffs, as owners, did the work, but they claimed to be reimbursed the cost by the defendant. The question turns upon the language of the lease entered into between the parties. I do not think that the cost of executing the work is a deduction from the rent. The rights of the parties must be governed by the covenant. A great many words have been used apparently with the intention of including every possible case that may arise. The tenant is to bear, pay, and discharge all "taxes, rates, duties, assessments;" why should not that include the duty of making good the defective drainage? Why should not the tenant bear the cost? I cannot give an answer to this which is satisfactory to myself. It has been said that this covenant is applicable only to rates and taxes and charges of a similar kind: I think that a sufficient answer to that is to be found in the circumstance, that the word "duties" itself is used. It is said that the covenant is applicable only to charges which are recurrent in their nature; but it extends to improvement rates, which are not of that description. It has been said, why should not this expense be borne by the landlord; but the question is, whether words sufficiently wide have been used to cast the burden upon the tenant; I am at a loss to see what other words can be put in: it seems to me that the parties intended to specify every kind of disbursement which they could think of. Suppose that the local authority were to do the work in the first instance, could it be contended that in that case there would not be a "duty" cast upon the landlord, which the tenant would be bound to discharge by force of this covenant? Will it not be strange if the landlord cannot recover it from the tenant because he has himself done what was necessary; in other words, will it not be unreasonable if the liability depends upon the circumstance whether the local authority itself has done the work? Willes, J., in *Thompson* v. *Lapworth* (1), spoke of the argument as captivating,

(1) Law Rep. 3 C. P. 149, at pp. 157, 158.

1880

BUDD v. MARSHALL.

Bramwell, L.J.

that it was an injustice to the tenant, who has only a limited interest, to be compelled to bear the whole expense for his landlord's benefit; but the answer is, that under a lease for ninety-nine years the tenant would gain substantially the whole benefit. Landlords always endeavour to extend the liability of the tenants by putting in additional words, and in this they generally succeed, for tenants have not the same persistency. I am of opinion that the construction of the lease is in favour of the plaintiffs; the lessors wanted to get as rent a certain fixed sum without any abatement.

As to the cases, it is extremely difficult to take them into account, but so far as they go I think them in favour of the construction which I adopt. In *Tidswell* v. *Whitworth* (1) the words were "tax, rate, assessment, or imposition," and these are not so wide as those in the present case. But in *Thompson* v. *Lapworth* (2) decided in the following year, it was held that the tenant had bound himself to pay a similar charge by force of the words, "taxes, rates, duties, and assessments." In *Crosse* v. *Raw* (3) it was held that the expense of making a drain was an "outgoing," for which the tenant was liable. Pollock, B., agreed with the judgment which I delivered in that case, and I abide by the decision and the reasoning upon which it was founded, but I should not now use the word "preposterous," because I feel the difficulties attending the case. Two other cases of a similar nature have been cited, which were decided before Lindley, J.: *Rawlins* v. *Briggs* (4), and *Hartley* v. *Hudson* (5); the former was decided upon the authority of *Tidswell* v. *Whitworth* (1); but the latter is very much in favour of the view taken by me.

I think that the appeal ought to be disallowed.

BAGGALLAY, L.J. The plaintiffs in this action are the landlords, and the defendant is the tenant of certain premises at Brighton, known as the "Portland Mews," which are held for the residue of a term of twenty-one years, from the 25th of December, 1867, created by an indenture of lease, dated the 1st of July, 1868;

(1) Law Rep. 2 C. P. 326.
(2) Law Rep. 3 C. P. 149.
(3) Law Rep. 9 Ex. 209.
(4) 3 C. P. D. 368.
(5) 4 C. P. D. 367.

1880

BUDD v. MARSHALL.

Baggallay, L.J.

and the question, which we have to determine upon the present appeal, is whether the plaintiffs, as such landlords, are entitled to recover from the defendant the amount expended by them in the construction of certain drainage works pursuant to the requirements of the local sanitary authority.

The circumstances under which the expenditure was incurred, are not in dispute, and may be concisely stated as follows: in the month of September, 1877, the mayor, aldermen, and burgesses of Brighton, being the sanitary authority of that borough, and acting under the provisions of the Public Health Act, 1875, caused a notice to be served upon the plaintiffs, requiring them, as the owners of the said premises, to abate a nuisance arising from defective drainage, and for that purpose to drain the said premises into the common sewer, and to fill up all cesspools, and the requirements of such notice not having been complied with, an order to the like effect was, upon the application of the sanitary authority, made by a justice of the peace in February, 1878. The proceedings of the sanitary authority were authorized by the 94th and following sections of the Act, and were in all respects regular, and the order so made by the borough justice became binding upon the plaintiffs as the owners or landlords of the said premises. In obedience to such order, the plaintiffs executed the required works, and expended in so doing a sum of money, which it has been agreed shall, for the purposes of the action be taken at 124*l*. If the plaintiffs had neglected or failed to obey such order, the sanitary authority would have had power under the 98th section of the Act, to enter upon the premises and to do what might be necessary in execution of the order, and to recover from the plaintiffs in a summary manner the expenses incurred by them in so doing. It is unnecessary to refer more particularly to those provisions of the Act, which bear upon the subject now under consideration; it is clear from their general scope that it was the intention of the legislature to impose upon the landlord in the absence of any contract to the contrary, the burden of any expenditure of payment, which might be rendered necessary for giving effect to such provisions; it is, however, provided by the 104th section that nothing contained in the Act, shall affect any contract, whereby it may be agreed that the occupier shall pay or

1880

BUDD v. MARSHALL.

Baggallay, L.J.

discharge all rates, dues, and sums of money payable in respect of the demised property or any contract whatsoever between landlord and tenant, and it is now contended by the plaintiffs, that the defendant, as tenant of the said premises, is bound under a covenant contained in his lease, to repay to them the amount which they have in manner aforesaid expended. The covenant in question provides that the tenant shall bear, pay, and discharge the land-tax (if any), sewers rate, borough rate, improvement rate, tithes, and tithe rent-charge in lieu of tithes, and all other taxes, rates, duties, and assessments whatsoever, whether parliamentary, parochial, or otherwise, which at the date of the lease were or at any time thereafter during the said term, should be taxed, charged, rated, assessed, or imposed on the said demised premises, or any part thereof, or upon the landlords or tenants in respect thereof. Grove, J., by whom the action was tried without a jury, was of opinion that the amount expended by the plaintiffs was a duty charged or imposed upon them as landlords in respect of the demised premises, and gave judgment in their favour, and I am of opinion that his judgment should be affirmed.

Were it not that Brett, L.J., has arrived at a different conclusion, I should have deemed it sufficient to support the opinion, which I have thus formed, to state, as I have already done, the circumstances under which the payment has been made by the plaintiffs, and the terms of the covenant by which the defendant is bound; if the plaintiffs had neglected to obey the order of the borough justice, and the sanitary authority had executed the required works, and had recovered the costs of so doing from the plaintiffs, I am unable to understand upon what grounds it could have been successfully contended that the payment so made was not imposed upon them in respect of the demised premises; and it cannot, in my opinion make any difference, that they executed the works and incurred the expense of so doing in obedience to the order, instead of waiting to pay the costs of the execution of the works by the sanitary authority, after their disobedience of the order had rendered such a proceeding necessary.

Several cases have been referred to in the course of the argument upon the present appeal, in which questions similar to that which we have now under consideration have received judicial solution;

1880

BUDD v. MARSHALL.

Baggallay, L.J.

the decisions have in some of such cases been favourable to the landlords and in others to the tenants, but it will be found upon examination that the more or less comprehensive character of the covenant has led to the varying results; the charge or payment sought to be recovered from the tenant has been of the same nature or description in each of the cases cited.

On the part of the defendant much reliance has been placed upon the case of *Tidswell* v. *Whitworth* (1): in that the covenant was to pay and discharge all taxes, rates, assessments, and impositions whatsoever (except property tax) which during the term should become payable in respect of the demised premises, and it was held that the tenant was not bound to repay to the landlord the amount assessed upon him in respect of certain paving and draining works which had been constructed under the Manchester Improvement Act; but the same four judges, namely, Bovill, C.J., Willes, Keating, and Montague Smith, JJ., who were unanimous in so holding in *Tidswell* v. *Whitworth* (1), were also unanimous in holding, a few months later, in *Thompson* v. *Lapworth* (2), that a tenant who had covenanted to "pay and discharge all taxes, rates, duties, and assessments whatsoever, which should be taxed, assessed, or imposed upon the tenant or landlord of the premises in respect thereof," was liable to repay to the landlord the amount which he had been required to pay in respect of the paving of a street under the provisions of the Metropolis Management Act. In the former of these cases, *Tidswell* v. *Whitworth* (1), the judges were careful to distinguish it from *Sweet* v. *Seager* (3) and *Payne* v. *Burridge* (4), and other cases which had preceded it, and in which the decisions had been in favour of the landlord, pointing out however that it was very near the line, whilst in *Thompson* v. *Lapworth* (2) they were equally careful to distinguish it from *Tidswell* v. *Whitworth* (1); it is clear from the reports of the two cases that the decision arrived at in the later case was due to the more comprehensive terms of the covenant.

The terms of the covenant which we have now under consideration are at least as comprehensive as were those in *Thompson* v. *Lapworth* (2); and whether the decision in *Tidswell* v. *Whit-*

(1) Law Rep. 2 C. P. 326.
(2) Law Rep. 3 C. P. 149.
(3) 2 C. B. (N.S.) 119.
(4) 12 M. & W. 727.

worth (1) is one which can or cannot be defended upon the ground of its special circumstances, it is to my mind clear that the judges who decided it in favour of the tenant must have decided the present case in favour of the landlord, if they adhered to the views expressed by them in *Thompson* v. *Lapworth*. (2)

The defendant has also relied upon the case of *Rawlings* v. *Briggs* (3), in which the covenant was to "pay and discharge all taxes, and all manner of rates, charges, assessments, and impositions whatsoever, to be charged, assessed, or imposed upon the premises thereby demised, or in respect thereof, or in respect of the said rent by authority of parliament or otherwise howsoever," and Lindley, J., held, upon demurrer, that the tenant was not liable to repay to the landlord the amount expended by him in abating a nuisance pursuant to the requirements of the local sanitary authority of Reading. In so deciding, Lindley, J., expressed his opinion that the terms of the covenant did not substantially differ from those in *Tidswell* v. *Whitworth* (1), by the decision in which case he considered himself bound; but in *Hartley* v. *Hudson* (4) the same learned judge held that, under a covenant to pay and discharge "all rates, taxes, charges, and assessments whatsoever, which now are or may be charged or assessed upon the said premises or upon any person or persons in respect thereof," the tenant was liable to repay to the landlord the amount which he had been compelled to pay to the sanitary authority, in respect of certain sewerage and paving works executed by them under the provisions of the Public Health Acts after failure by him to obey an order to that effect. Lindley, J., treated the covenant in *Hartley* v. *Hudson* (4) as equivalent to that in *Thompson* v. *Lapworth* (2), and particularly directed attention to the words "taxed, assessed, or imposed on the tenant or landlord of the demised premises in respect thereof," in the covenant in *Thompson* v. *Lapworth* (2), and to the words "charged or assessed upon the said premises or upon any person or persons in respect thereof" in the covenant, which he had under consideration. In the present case we have the equivalent words, "taxed, charged, rated, assessed, or imposed on the said demised premises or any

(1) Law Rep. 2 C. P. 326.
(2) Law Rep. 3 C. P. 149.
(3) 3 C. P. D. 368.
(4) 4 C. P. D. 367.

1880

BUDD v. MARSHALL.

Baggallay, L.J.

part thereof, or upon the landlords or tenant in respect thereof." We have also, as in *Thompson* v. *Lapworth* (1), the word "duties" in addition to "rates, taxes, and assessments" in the enumeration of the charges and impositions to which the covenant is made applicable; and the addition of the word "bear" to the words "pay and discharge" in the earlier part of the covenant has, in my opinion, the effect of more distinctly developing its very comprehensive character. The case of *Crosse* v. *Raw* (2) is to the same effect as *Thompson* v. *Lapworth* (1), though the language of the covenant is slightly different.

The result of the authorities, to which I have alluded, is in favour of the conclusion at which I have arrived: we are not bound by them, except so far as we may agree with the conclusions arrived at, and with the reasons assigned; but in my opinion *Thompson* v. *Lapworth* (1) and *Crosse* v. *Raw* (2) were rightly decided, and I assent to the reasons assigned.

Before concluding, I must say a few words with reference to an argument which has been somewhat strongly pressed upon us: it has been urged on behalf of the defendant that it would be inequitable to charge upon the tenant an expenditure, which is made for the permanent improvement of a property in which he has only a temporary interest, and that a construction, which would have that effect, should not be put upon the covenant in question, if the language will fairly admit of any other. Now with reference to this argument it must be borne in mind that a tenant for a term of years derives a benefit, greater or less according to the unexpired portion of his term, from any expenditure for the permanent improvement of the property, and that it would be equally inequitable to impose upon the landlord the whole burden of an expenditure, from which he can derive no benefit during the remaining portion of his tenant's term; in the present case at least half of the defendant's term was unexpired at the time when the drainage works were executed. Again the defendant has, by the terms of the covenant which we are now considering, clearly taken upon himself, and must be presumed to have done so knowingly and willingly, some burdens which may result in a benefit to the demised premises beyond the period of his tenancy,

(1) Law Rep. 3 C. P. 149. (2) Law Rep. 9 Ex. 209.

as for instance, "improvement rates," which under ordinary circumstances are imposed in respect of an expenditure for permanent improvements; and, inasmuch as, at the date of the lease, a Public Health Act was in force, under which burdens might have been imposed upon the plaintiffs similar to that, which they have been called upon to bear under the existing Act, it is difficult to suppose that such a burden was not in the contemplation of the parties at the time when the covenant was entered into. But, even if the argument has force to the extent of supporting the view that expenditure of a like character should primarily be thrown upon the landlord, as it has been by the Public Health Act, I can well understand that for the purpose of obtaining what he might deem in other respects an eligible lease, an intending tenant would willingly subject himself to obligations, to which but for his covenant he would not be made liable. Again, it is common knowledge that, generally speaking, the object of a landlord is to secure during the term a rent of certain amount, as free from all deductions as the law will permit, and to effectuate this object, the amount of rent is fixed with reference to all the obligations which the tenant may be willing to take upon himself, and I can see nothing inequitable in holding the tenant to the terms of his bargain.

Judgment affirmed.

Solicitors for plaintiffs: *Anderson & Sons.*
Solicitors for defendant: *Tilleard, Godden, & Holme.*

1880
April 8.

[IN THE COURT OF APPEAL.]

THE LONDON JOINT STOCK BANK *v.* THE MAYOR AND ALDERMEN OF THE CITY OF LONDON AND SARAH GRIESIELL.

Lord Mayor's Court—Foreign Attachment—Corporation.

A joint stock bank sued for a prohibition to restrain proceedings in foreign attachment against them as garnishees, having in their hands moneys of T. G. The defendants pleaded a custom that on a plaint of debt being brought in the Lord Mayor's Court the Court might summon the defendant, and that if the serjeant-at-mace certified that the defendant had nothing in the city whereby he might be summoned, and the defendant made default in appearing, and the plaintiff alleged that some other person in the city had goods of the defendant in his hands, then the Court should command the serjeant to attach the defendant by such goods, that if the serjeant certified to the Court that the defendant had been attached by such goods, and if the defendant at that Court and three subsequent Courts being solemnly called did not appear, then after such four defaults had been recorded the Court might call on the garnishee to appear and shew cause why the plaintiff should not have judgment and execution of such goods, and that if he did not appear then the Court had authority to award the plaintiff to have judgment and execution of the goods. The plea went on to allege that S. G. had brought a plaint of debt against T. G., that T. G. had been summoned and had not appeared; that the serjeant had returned that T. G. had nothing within the city by which he could be summoned; that S. G. had alleged that the plaintiffs had goods of T. G. in their hands, and that thereupon the Court had ordered the serjeant to attach T. G. by those goods, and that the serjeant had certified to the Court his having done so, and that T. G. at the same Court was solemnly called but did not appear, and that T. G. had made default at three subsequent Courts, which defaults had been recorded. T. G. had in fact never been summoned nor received any notice of S. G.'s plaint. The proceedings to attach his property having been carried on without notice to him according to the course of foreign attachment as practised for the last two centuries, although in making up the record on the appearance of the garnishee it has been the practice to insert fictitious statements, such as those contained in the above plea, as to the defendant being summoned and making default:—

Held, that the allegations that T. G. had been summoned and made default were of the substance of the plea, and that as they were untrue the custom had not been followed, and a prohibition to restrain the proceedings had rightly been granted.

Semble, per James and Bramwell, L.JJ., that proceedings in foreign attachment cannot be taken against a corporation as garnishees.

Affirmed by H. of L. 6 App. Cas. 393 H.L.

THIS was an appeal by the Mayor and Aldermen of the city of London from a decision of the Common Pleas Division. (1)

(1) 1 C. P. D. 1.

1880

LONDON JOINT STOCK BANK v. MAYOR OF LONDON.

The declaration in prohibition delivered on the 26th of June, 1874, stated that on the 18th of March, 1874, Sarah Griesiell had sued out and served on the plaintiffs, the London Joint Stock Bank, a process of foreign attachment in the following form :—

"To the London Joint Stock Bank, "18 March, 1874.

"Take notice that by virtue of an action entered in the Lord Mayor's Court of London, on the 18th of March, 1874, against Thomas Griesiell defendant, at the suit of Sarah Griesiell, in a plea upon demand of 150*l.*, I do not attach all such moneys, goods, and effects, as you now have or which hereafter shall come into your hands or custody of the said defendant to answer the said plaintiff in the plea aforesaid, and that you are not to part with such moneys, goods, or effects without license of the said Court.

"C. Fitch,
"Serjeant-at-Mace,
"Lord Mayor's Court Office.

"NOTE.—With respect to moneys this attachment only applies to such a sum of money as may be sufficient to cover the amount above sworn to.

"With respect to goods it only applies to such goods as are within the city and jurisdiction of the said Court."

The declaration went on to allege that the plaintiffs were a corporation, and as such were not liable to any process of foreign attachment, and prayed a writ of prohibition to prohibit the Recorder and all others the judges and officers of the Lord Mayor's Court from proceeding with the process of attachment.

The defendants pleaded the pleas, which will be found partially stated in the report below.

After alleging the custom as there stated, the 3rd and 4th pleas went on to state to the effect that on the 18th of March, 1874, Sarah Griesiell came to the Court and affirmed a plaint against Thomas Griesiell in a plea of debt for 150*l.*, and appointed an attorney, and that on her ~~plaint~~ then and there made to the Court that one of the serjeants-at-mace should summon Thomas Griesiell to appear before the Court to answer Sarah Griesiell in the plea in such plaint specified, and that the serjeant-at-mace

1880

LONDON JOINT STOCK BANK v. MAYOR OF LONDON.

should return and certify what he should do by virtue of the precept. That afterwards at the same Court the serjeant-at-mace returned and certified to the Court that T. Griesiell had nothing within the city or the liberties thereby whereby he could be summoned, nor was he to be found within the same, and thereupon the said T. Griesiell was then and there at the same Court solemnly called and did not appear, but made default. That thereupon it was alleged by Sarah Griesiell that the plaintiffs, the London Joint Stock Bank, had effects of T. Griesiell in their hands within the city. That thereupon Sarah Griesiell prayed process to attach T. Griesiell by the said goods and effects, or that he might appear at the next Court to answer Sarah Griesiell in the plea in the plaint specified. That thereupon at her petition it was commanded to the serjeant-at-mace to attach T. Griesiell by the goods and effects in the hands of the plaintiffs, the Joint Stock Bank, or that he might appear at the next Court, and that the serjeant-at-mace should then return and certify to the Court what he should do by virtue of that precept. That thereupon the serjeant-at-mace attached T. Griesiell by the said goods and effects, and at the next Court returned and certified that he had attached T. Griesiell by the said goods and effects, so that he might appear to answer the plea in Sarah Griesiell's plaint. That thereupon the said T. Griesiell at the same Court was solemnly called but did not appear, but then made a first default, which said first default at the same Court was recorded: that thereupon, according to such custom, a further day was given by the same Court to the said T. Griesiell to appear at the next Court. That thereupon the said T. Griesiell was solemnly called but did not appear, but made a second default which said second default at the same Court was recorded. That thereupon, according to custom, a further day was given to the said T. Griesiell to appear at the next Court. That thereupon T. Griesiell was solemnly called but did not appear, but this made a third default, which said third default was duly recorded and thereupon, according to the custom, a further day was given by the same Court to T. Griesiell to appear, and that thereupon the said T. Griesiell was solemnly called but did not appear, but then made a fourth default, which fourth default was duly recorded

according to the custom. And the pleas concluded with the allegation set out in the report below.

The plaintiffs demurred to the third and fourth pleas, and the case was decided by the Common Pleas Division in their favour, on the ground that the custom of foreign attachment did not apply to an incorporated joint stock company. The mayor and aldermen having appealed, an order was made by arrangement for having the issues of fact in the case determined by means of a special case, to be stated for the opinion of the Court by an arbitrator before the further argument of the appeal on the demurrers.

The arbitrator, by his special case, stated the following facts as to the practice relating to foreign attachment:—

"The following is the practice relating to foreign attachment in ordinary cases.

"A book called the action book is kept in the Mayor's Court office.

"A plaintiff (Henry Styles) intending to resort to the remedy of foreign attachment enters his action against the defendant (Thomas Williams) in that book.

"No process against the defendant issues, and no notice is given to him of the action or attachment, but the plaintiff makes an affidavit of debt and gives information in the Mayor's Court office that the defendant has money or goods in the hands of John Jones (afterwards the garnishee).

"Thereupon the serjeant-at-mace serves forthwith upon John Jones a notice in the following form:—[See the attachment above].

"The next step is the issue, at the expiration of four days, and at the instance of the plaintiff, of a scire facias calling upon John Jones (now the garnishee) to appear upon a day named, and shew cause why the plaintiff should not have execution of the money or goods of the defendant in his hands. This is served by the serjeant-at-mace upon the garnishee.

"If the garnishee does not appear, judgment is given for the plaintiff against the garnishee by default.

"If the garnishee does appear the appearance is recorded, and then a record is made up stating the matters aforesaid, and containing a number of other averments, which, whatever their origin,

1880

LONDON JOINT STOCK BANK v. MAYOR OF LONDON.

are now, and have long been, formal and fictitious, and which will be more particularly noticed hereafter.

"A rule to plead is then given to the garnishee, and upon his pleading that he has not in his hands any money or goods of the defendant, or any other defence, the issue or issues are tried in the usual way, and if determined in favour of the plaintiff judgment is given for the plaintiff against the garnishee.

"In case of a debt in the hands of the garnishee, the following is the form of final judgment, whether by default or upon trial of issues:—

"Therefore it is considered by the Court that the said plaintiff have execution of the said pounds, in moneys numbered, so attached as aforesaid (and by the jury found as aforesaid), (subject to the garnishee's lien of pounds as aforesaid), by pledges, &c., if the defendant, &c., and process for the remainder, &c.

"In case of goods in the hands of the garnishee, where the garnishee does not appear, a judgment of appraisement is awarded. The serjeant-at-mace thereupon proceeds to the premises of the garnishee, and, if allowed by the garnishee, appraises the goods by two sworn appraisers, and returns the value to the Court. If not so allowed, or if the goods are not found, the serjeant-at-mace returns elongavit, and thereupon the value of the goods is assessed by a jury, and the amount of that assessment is treated as money of the defendant in the hands of the garnishee. If the garnishee appears, the jury who try the issues find also the value of the goods. The form of final judgment in the case of goods is as follows:—

"Therefore it is considered by the Court that the aforesaid plaintiff have execution of the said goods and chattels so attached and appraised as aforesaid [or the said goods and chattels so by the jury aforesaid found and valued as aforesaid] (subject to the garnishee's lien of pounds), by pledges, &c., if the defendant, &c., and process for the remainder, &c.

"Upon such judgment the plaintiff is entitled to have execution against the garnishee of the money or goods of the defendant in the hands of the garnishee to the amount of his claim sworn

against the defendant, upon his giving security by two responsible sureties to restore the money or goods to the defendant if such defendant shall, within a year and a day from execution executed, appear, and shall disprove the debt claimed against him by the plaintiff. The expression, 'and process for the remainder, &c.,' at the end of the final judgment in foreign attachment, means that the plaintiff is to have process against the defendant in the action for the residue of the sum claimed. It must be remembered that up to this time the defendant has not been summoned or appeared.

"It is a part of the practice that upon the defendant appearing to the action at any time before execution levied in foreign attachment, the attachment is ipso facto dissolved. Upon execution executed, however, the garnishee is discharged, as against the defendant, of the sum or goods of which execution was had.

"The following is the form of entry of satisfaction on the record of foreign attachment:—

> "And the said plaintiff here in Court, according to the custom, &c., found sufficient pledges to restore, &c., if the defendant, &c., A. B. and C. D., and thereupon a precept for that purpose being delivered to the said serjeant-at-mace, the said plaintiff had execution of the said pounds, in moneys numbered, so attached and condemned as aforesaid [or the said plaintiff had execution of the said goods and chattels so attached and appraised as aforesaid, at the sum of pounds], (subject to the garnishee's lien thereon of pounds), and thereof hath acknowledged himself satisfied.

"The proceedings above sketched out are real and in force at the present day. But besides these proceedings the record of foreign attachment made upon the appearance of the garnishee mixes up with the true history of what has been done a number of what are now, at all events, purely fictitious matters. It begins by stating that the plaintiff has summoned the defendant in an action of debt; that the serjeant-at-mace has returned that the defendant has nothing within the city by which he might be summoned, and that thereupon the plaintiff has by word of mouth testified to the Court that some other person has money or goods

1880

LONDON JOINT STOCK BANK v. MAYOR OF LONDON.

of the defendant in his hands within the jurisdiction, and that thereupon the Court has ordered the serjeant-at-mace to attach the defendant by such money or goods in the hands of such other person. It then goes on to state a return by the serjeant-at-mace of an attachment made accordingly (the last averment being according to the fact), and to allege that at that Court and three subsequent Courts the defendant has been solemnly called and made default, and that such four defaults have been recorded. It then proceeds to state (truly) the scire facias to the garnishee, and the subsequent proceedings already described.

"There is no doubt that the preliminary proceedings thus fictitiously alleged have, for at least two centuries past, ceased to be more than formal, but it cannot be ascertained at what precise period they became so."

It further appeared from the special case that if final judgment was given against the garnishee, and he did not comply with it, the practice had ever since 1838 been to issue against him a writ of capias directed to the serjeant-at-mace to the following effect:—

"We command you that you take X. Y., if he be to be found within the liberties of the city of London, and him safely keep so that you have his body here in Court without delay to satisfy A. B. the sum of £ [*or*, certain goods or chattels, that is to say . . . .] heretofore attached in his hands at the suit of the said A. B., as the proper moneys of C. D., defendant, by due process of attachment and judgment of the Court here before us recovered against him, the said C. D., and have you, the said X. Y., or the said moneys [*or*, the said goods or chattels, or the value thereof] here in Court without delay to render to the said A. B., according to the tenor and effect of the judgment thereof given. And this you are not to omit on the peril incumbent, and you have there this precept."

Before 1838 the practice had been to issue instead of the writ of capias a precept directing the serjeant-at-mace to receive the money or goods attached, and if the garnishee did not pay the money, or hand over the goods, the serjeant-at-mace arrested him without further warrant. Only one recorded instance had been discovered in which it appeared that any process other than

capias had been employed to enforce payment by a garnishee after judgment. This was a case in the year 1375.

April 6, 7, 8. *Sir H. James, Q.C., Webster, Q.C.*, and *R. S. Wright*, for the defendants, argued the case at length on the same grounds as those taken in the Court below; but as the decision of the Court went on a different point the arguments are omitted.

Benjamin, Q.C., W. G. Harrison, Q.C., and *Kemp, Q.C.*, for the plaintiffs. The whole practice of foreign attachment, as carried on in the present day, is invalid. Foreign attachment is only a process to compel the appearance of the defendant by attaching his property in the hands of other persons: *Levy* v. *Lovell* (1), and the cause in which it is issued ought to be a real cause in which the defendant is summoned, and his property is attached on his making default: *Fisher* v. *Lane* (2); *Bruce* v. *Wait*. (3) The preliminary proceedings which are alleged in the pleas, but which never in fact took place, are essential, and the pleas are therefore disproved, and the process is invalid. [They were then stopped by the Court.]

Webster, Q.C., in reply.

JAMES, L.J. I am of opinion that the plaintiffs in prohibition are entitled to our judgment. A great number of very interesting points have been raised, but as there is one point upon which the whole matter may be determined, I think it right to determine it upon that point alone. The defendants have pleaded a certain custom, and they have averred that the custom they have pleaded has been followed. Now, it seems impossible for us, without violating our judicial oaths, to find in point of fact that what has not been done has been done, and to find that that has been followed which has not been followed. The pleas allege a proceeding to compel a man to appear: suit, default, and proceedings based on that default. The whole of that is admitted now to be a mere fiction, nothing of the kind having been done; therefore in point of fact, not only are the pleadings not proved, but they are

(1) 14 Ch. D. 234. (2) 2 W. Bl. 834.
(3) 3 M. & W. 21.

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1880

LONDON JOINT STOCK BANK v. MAYOR OF LONDON.

essentially disproved. That the attachment is only a step in the cause, and that the cause ought to be a real cause in which that attachment is issued is shewn by *Bruce* v. *Wait* (1), and that case merely followed *Fisher* v. *Lane* (2), in which the principle is laid down very distinctly. Whether any other proceedings can be adopted, whether anything can be substituted for that very idle piece of paper, that is to say, the capias addressed to the officer of the corporation, directing him to seize a body corporate and arrest it, and what the effect would be if the mayor and aldermen were to adopt any other mode of proceeding for the purpose of doing that which the custom tells them they ought to do, it is not necessary for me to say; but as at present advised I see no sufficient reason to dissent from the conclusion to which the Common Pleas Division came, or from the grounds on which they came to that conclusion with respect to a corporation. I may perhaps not improperly add that if the proceedings in foreign attachment produce the result which they were intended from the first to produce, that is to compel the original defendant in the original action to appear in Court, and he does appear in Court and submit himself, I think that before they take him into custody they had better consider once, twice, or three times what would be the result of an action for false imprisonment? and I certainly advise no officer of the Court, or any servant of the Court, to make any return which is not according to the truth.

BAGGALLAY, L.J. I agree in thinking that this appeal should be dismissed, and on the one ground mentioned by the Lord Justice, namely, that the pleas are not proved. The third and fourth pleas differ slightly, but as regards the points on which I have formed my opinion they are substantially the same. By the pleas it is alleged that after the commencement of the action an order was given to one of the serjeants-at-mace of the said mayor, and a minister of such Court, that he according to such custom should summon the said Thomas Griesiell to appear at the same Court so holden before the mayor and aldermen of the said city to answer the said Sarah Griesiell in the plea in such plaint specified, and that the said serjeant-at-mace should return and certify what he should do by virtue of the said precept. That afterwards at

(1) 3 M. & W. 21. (2) 2 W. Bl. 834.

the same Court the said serjeant-at-mace according to such custom returned and certified to the same Court that the said Thomas Griesiell had nothing within the said city, or the liberties thereof, whereby he could be summoned, nor was he to be found within the same, and thereupon the said Thomas Griesiell was then and there at the same Court solemnly called and did not appear, but made default, and that thereupon the proceedings therein set forth were taken in accordance with what was alleged to be the custom. Now, not one of those circumstances to which I have just referred, and which were alleged in the pleas, has been proved. Therefore I treat the pleas as entirely unproved in most material and essential parts. As far as regards the various other questions referred to I desire to express no opinion at present, as I have only heard the arguments on one side of the question.

BRAMWELL, L.J. I am entirely of the same opinion. The plea has not been proved. It contains a variety of allegations which are not true. I have no doubt that if the matter had gone on, that is to say if this prohibition had not issued, and it had been necessary to make up a record, a record would have been made up which would have stated all these things to have existed, which in truth did not exist. I say that with no disrespect either to the defendants in prohibition or to the officers of the Court. I think they may be excused for doing that which has been done for 200 years. How it came to be done originally, how it could be permitted or tolerated I cannot understand, but I think that no blame or the smallest possible blame would be attributable either to the mayor and aldermen, or to the officers of the Court, at the present time, in doing that which doubtless they would have done if necessary, that is to say, drawing up a record stating a variety of things to have taken place which we know did not take place, and which in truth, however long it may have been the practice so to do, ought not to be stated upon the record contrary to the truth. I say, therefore, that the plea has not been proved, and although possibly a technical proof of it might have been furnished if the record had been drawn up (whether that would have been sufficient for the prohibition is another matter), the time has not arrived for doing it, and it has not been done. The plea therefore is not true in fact, and there is no estoppel or technical

1880

LONDON JOINT STOCK BANK v. MAYOR OF LONDON.

ground for holding it to be true. Then it has been urged upon us that these are immaterial allegations. Now really that is the most astonishing proposition that I ever heard, to say that that which is the very foundation of the proceeding of foreign attachment, namely, that the debtor has been summoned, that something has been done which would give him the opportunity of appearing and constituting himself defendant in an action, and so precluding the necessity of any foreign attachment at all—is immaterial. It is said that is immaterial, because for 200 years proceedings in foreign attachment have gone on without its being done. It is a marvel to me that such a process should have existed for 200 years with no greater abuse of it than appears to have taken place, because we do not hear of any parties whose property has thus been attached coming forward to say, "We have been wronged by these proceedings taken behind our backs, by which some one who owed us money has been bound to hand it over to a third person, who if the truth were known had no right to it." But how can this Court possibly hold that the summoning the defendant in the original action is immaterial? There is a proceeding by attachment in the High Court of Justice, but that Court does not allow a man in the first instance to come and say "A. B. owes me money, and C. D. owes money to A. B., therefore tell C. D. to pay me." In the High Court of Justice if a man wants to attach a debt owing by a third person to his debtor, he must first get a judgment against his own debtor, and he cannot get that judgment without either personally serving him, or taking the utmost pains to do so and getting an order for substituted service, and if that is a rational practice in this Court, and I do not suppose that any one will say it is not, how can it possibly be an immaterial part of the practice of the Lord Mayor's Court? I hold, therefore, that there really is no pretence for saying that this is an immaterial allegation which need not be proved.

Another thing to be observed in the case before us is that the question here is not between the garnishee and his creditor. If the record of foreign attachment were drawn up stating that the custom had been observed, and the garnishee paid money under an execution issuing against him, it might be that in any action brought against him by his creditor, he would be at liberty to

say, "Here is a judgment of a Court of competent jurisdiction which alleges everything necessary to justify me in paying the money, and I have paid it under an execution, therefore, you, my creditor, who now seek to get it over again from me are estopped and precluded from questioning the propriety of that payment." That might be so, but this is not a case of that description. In the first place, there is no estoppel because the record has not been drawn up; and if it had been, I am not prepared to say that there is not a great difference between a case where a garnishee is defending himself against having to pay the money twice over, and a case where the contest is against the Lord Mayor and aldermen as to whom there ought to be no estoppel at all, because there ought to be no estoppel by their own act. That question, however, does not arise here as the record has not been drawn up. I am of opinion, therefore, that the plea is not true; it is not proved in point of fact, and although possibly it might have been taken as proved if a record had been prepared containing these fictitious allegations, yet, that not having been done, the plea is not proved either in fact or technically, and the judgment in favour of the plaintiff must stand. Let it not be supposed that I object in this way to this fiction merely because it is a fiction. John Doe and Richard Roe were fictions, but harmless. The fiction here is contrary to all reason and justice; it enables a man to enforce ex parte a claim, without giving him against whom it is made notice that it is so made.

With respect to the question whether a corporation is within this custom, though it is not necessary to give any opinion upon it, I desire to say that I am far from differing from the judgment of the Court below. If an Act of Parliament were passed enacting that a judgment of foreign attachment might be enforced by fieri facias, possibly a corporation would come within the custom, because it would then be a custom applicable to a corporation. At present there seems to be strong ground for saying, as the Common Pleas Division did, that a corporation is not within the custom, for this reason: not that a corporation is not within the principle of the custom, but because the process for enforcing it is not applicable to a corporation. In order to compel the corporation to pay, a ridiculous writ—I cannot call it anything else—would have to be issued by which the

1880

LONDON JOINT STOCK BANK v. MAYOR OF LONDON.

serjeant-at-mace would be ordered to take the corporation, which I suppose, if it means anything, means not only the directors, but all the ten thousand shareholders, if there were so many. Now supposing that in one sense a corporation is within the custom, still if you see that the custom cannot be applied as against the corporation, that corporation has, I think, a right to come to a court of law and say: "Do not allow these people to harass us with a ridiculous proceeding, which must eventuate in nothing, but prohibit them from going on with it." It is unnecessary to express any concluded opinion upon that point, but I desire it not to be supposed that, because we decide the case on the ground that the plea has not been proved, therefore I differ from the opinion expressed by the Court below.

JAMES, L.J. There is one thing I wish to mention. It appears to me that the only origin of this custom is, as Mr. Benjamin said, to compel the defendant to appear, and when he did appear the whole object was attained. In other courts difficulty used to occur because the Court could not go on to try a case until the defendant appeared. The Court of Chancery therefore used to arrest a man to compel him to enter an appearance, because as soon as he appeared the Court had full jurisdiction to go on to final judgment. So if a defendant appears and submits to the jurisdiction of the Lord Mayor's Court the judgment of that Court is as effective against him as any other judgment in any other Court.

BAGGALLAY, L.J. As my Brethren have intimated opinions upon a point beyond the one point on which I grounded my opinion that this appeal should be dismissed, I think it only right to say that, as at present advised, I should hesitate before agreeing with the view of the Common Pleas Division with reference to the difference between an individual and a corporation, nor do I at the present moment altogether assent to the view that the proceedings in foreign attachment were solely for the purpose of compelling appearance.

Appeal dismissed.

Solicitors for plaintiffs: *Clarke, Sons, & Rawlins.*
Solicitor for defendants: *The City Solicitor.*

THE MANCHESTER BONDED WAREHOUSE COMPANY, LIMITED *v.* CARR.

1880 *June* 16.

Landlord and Tenant—Floors of Warehouse—Overloaded by Tenant—Fall of Premises—Covenants to repair—Waste—Liability for Rent and Damages.

The plaintiffs demised certain floors in a warehouse to the defendant at a rent. He covenanted to repair, maintain, and keep the inside of the premises in good and tenantable repair and condition, and to deliver them up at the end of the term, damage by fire, storm, or tempest, or other inevitable accident, and reasonable wear and tear only excepted. The plaintiffs covenanted to keep the walls, roof, and main timbers of the premises in good and substantial repair and condition. The lease also contained a provision for the suspension of the rent in the event of the premises being burnt down, or damaged by fire, storm, or tempest.

Sub-lessees of the defendant overloaded a floor with flour, in consequence of which the whole building fell. The plaintiffs rebuilt it and sued for rent during the time the building was unoccupied, and for damages. The defendant denied liability, and claimed damages from the plaintiffs.

Held (1.), that, notwithstanding the fall, the defendant was liable to pay the rent; (2.) that there was no implied warranty by the plaintiffs that the building was fit for the purpose for which it was to be used; (3.) that, in the absence of notice to them of any damage or want of repair, the plaintiffs were not liable on their express covenant to keep the walls, roof, and main timbers of the building in repair; (4.) that on the authority of *Saner* v. *Bilton* (7 Ch. D. 815) the destruction of the building, if caused by using the property demised in what was apparently a reasonable and proper manner, having regard to its character and to the purposes for which it was intended to be used, was not waste, and therefore the tenant would not be liable to pay damages for it; (5.) that as the case was not within the exceptions in his express covenant to repair, he was liable under it to the cost of putting the inside of the floors demised, and the fixtures therein in good and tenantable repair.

THE case was stated in the judgment of the Court, written by Lindley, J., thus:—

This action came on for trial at Manchester, before Lord Coleridge, C.J., at the last Winter Assizes, and was for convenience adjourned here for the determination of several questions of law which the parties desired to have decided before any disputed facts were gone into. (1) The undisputed facts were as follows: By a lease made in December, 1875, the plaintiffs demised to the defendant certain floors in a warehouse for seven years, at a rent

(1) The questions in the case were raised for the Court by means of a decision, formally given in favour of the plaintiffs at the trial, and a rule for a new trial afterwards granted on the ground of misdirection.

1880

MANCHESTER BONDED WAREHOUSE COMPANY v. CARR.

of 450*l.* By that lease the lessee covenanted to repair, maintain, and keep the inside of the demised premises in good and tenantable repair and condition, and to deliver them up at the end of the term, damage by fire, storm, or tempest, or other inevitable accident, and reasonable wear and tear only excepted. The lessors on the other hand covenanted to keep the walls, roof, and main timbers of the premises in good and substantial repair and condition. The lease also contained a provision for the suspension of the rent, in the event of the premises being burnt down or damaged by fire, storm, or tempest. There was also a clause against assigning or underletting without the written consent of the lessors. The defendant in fact sub-let some of the floors without the written consent of the plaintiffs.

Some or one of these under lessees put a quantity of flour into one of the upper storeys let to the defendant, and, in fact, overloaded it, in consequence of which the whole building fell. The plaintiffs have since rebuilt it, and they claim against the defendant:—

1. Rent since the fall of the building during the time it was unoccupied. 2. Damages occasioned by the fall, i.e., either the whole cost of reconstruction, or at least the cost of reconstructing the interior of the demised floors, as distinguished from the walls, roof, and main timbers thereof.

The defendant on the other hand denies his liability to pay the rent sued for or any damages; and he himself claims damages from the plaintiffs for a breach by them of their covenant to repair the walls and main buildings of the warehouse, and upon an implied warranty by the plaintiffs that the premises were in a fit condition for the purposes for which they were let.

C. Crompton (*Sir F. Herschell, S.G.*, with him), for the plaintiffs. First. No covenant by the landlords creating a liability to compensate the tenant for the fall of the floors can be implied. Even if there was an express covenant to repair, the landlords were not bound to repair until notice: *Makin* v. *Watkinson.* (1) The weakness was not apparent to them. The tenant takes premises as they are. Caveat. If they fall he must suffer. The question

(1) Law Rep. 6 Ex. 25.

of implied warranty was discussed in *Wilson* v. *Finch-Hatton*. (1) There the Court of Exchequer held that in an agreement to let a furnished house, there is an implied condition that this house shall be fit for occupation at the time at which the tenancy is to begin.

[LORD COLERIDGE, C.J. In the cases on which that decision proceeds the judges carefully distinguished between furnished and unfurnished houses, and the law was, I thought clear, that on the letting of a house there is no implied warranty that it is fit for habitation. But the judgment in *Wilson* v. *Finch-Hatton* (1) goes further. The defect was in the drains, and because the agreement comprised furniture, the Court held that there was an implied warranty as to the structure of the house.]

Pollock, B., however began his judgment by saying, "If this were the case of an agreement for the letting of real property, the well-established rules of law would apply, and they would force us to hold that the tenant could not succeed in this case." (2)

Secondly. There is an implied warranty by the tenant to re-deliver the premises in the same state as they were in on his entry.

[LINDLEY, J. What is your authority for that proposition? The real question seems to be on whom does the onus of ascertaining what the building is fit for lie?]

On the tenant. He has misused the premises.

[LORD COLERIDGE, C.J. Where is the limit? Is a tenant liable for putting too many books in his house, and so overloading the floors?]

The tenant may examine the premises before taking them, and ascertain whether they are fit for the purpose he intends, whereas the landlord cannot know what use the tenant means to put them to.

Thirdly. Even if the use of the premises by the defendant was reasonable, and he is not liable for the accident, he is still liable under the covenants of the lease to pay the reserved rent. To that there is no answer: *Saner* v. *Bilton* (3), unless it be the counter-claim.

(1) 2 Ex. D. 336. (2) 2 Ex. D. 336, at p. 343.
(3) 7 Ch. D. 815.

1880

MANCHESTER BONDED WAREHOUSE COMPANY v. CARR.

Ambrose, Q.C. (*C. Russell, Q.C.*, and *S. Taylor*, with him), for the defendant. It is not necessary to argue for an implied warranty by the landlords. The plaintiffs knew the building had been a mill, the defendant took it as a first class warehouse.

First. There is nothing in law to render the defendant liable. He has broken no covenant.

Secondly. The plaintiffs allege that the defendant has used the premises in an untenantlike manner, and has, in fact, committed waste. But the building was advertised and let as a warehouse, and has been used as such, and therefore the defendant is not liable for the fall. "Waste" involves some improper user, although not indeed necessarily active misfeasance: Cruise's Dig. tit. 8, ch. 2. s. 3; tit. 3, ch. 2, s. 11. No definition of it includes such a case as the present one.

Thirdly. The answer to the claim for rent is that the defendant was evicted by notice not to enter on the premises as they were dangerous, and also that the plaintiffs were liable on the covenant to repair, for directly the floors fell the building was out of repair.

Gully, Q.C., and *R. Henn Collins*, for the sub-lessees—third parties—did not argue.

The judgment of the Court (Lord Coleridge, C.J., Grove and Lindley, JJ.), was read by LORD COLERIDGE, C.J., and, after the statement of the case above set forth, was as follows:—

First, we are of opinion that notwithstanding the fall of the building, the defendant is liable to pay rent for it as if it had never fallen. This covenant to pay rent is qualified, but the proviso qualifying it does not include such a case as has actually happened. As applied to the facts of this case the defendant's covenant to pay rent is express and without qualification, and he must pay rent accordingly: see *Saner* v. *Bilton* (1), and the cases there cited.

Secondly, we are of opinion that the plaintiffs are not liable to damages by reason of any implied covenant or warranty by them that the building was fit for the purpose for which it was to b used. No authority has been found which decides that there is any such warranty; what authority there is on the point is

(1) 7 Ch. D. 815.

against its existence: *Hart* v. *Windsor* (1); *Sutton* v. *Temple* (2), and we are of opinion that no such warranty can be implied. There are, it is true, some cases relating to furnished apartments and houses which tend to shew that a person who lets them impliedly warrants that they are fit for residential purposes: *Smith* v. *Marrable* (3) and *Wilson* v. *Finch-Hatton* (4); but we are not prepared to extend these decisions to ordinary leases of lands, houses, or warehouses, as we must if we are to hold the plaintiffs liable for the fall of this warehouse by reason of any implied covenant or warranty.

Thirdly. We are of opinion that the plaintiffs are not liable to pay any damages to the defendant by reason of the express covenant binding the plaintiffs to keep the walls, roof, and main timbers of the building in repair. Before the building fell the plaintiffs had no notice of any danger or want of repair, and such notice is essential to render them liable to be sued on their covenant: *Makin* v. *Watkinson* (5), approved and followed in *London and South Western Ry. Co.* v. *Flower.* (6) If we are correct in this respect it will follow that neither before or after the fall of the building was there any breach by the plaintiffs of their express covenant to keeps its walls, &c., in repair. If, indeed, the defendant can shew unreasonable delay in the re-building by the plaintiffs, he will be entitled to such damages, if any, as such delay may have caused him, and if the case is re-tried this point will be open to him.

Fourthly. We have to consider whether the defendant is liable for the fall of the building. This covenant to repair the demised premises clearly is not extensive enough to render him liable to rebuild the whole warehouse; but it was contended that as he or his undertenants in fact overloaded the building and caused its fall, he is liable to rebuild it, although there may be no express covenant on his part binding him so to do. It was contended that he was liable for waste and destruction, and it was argued that whenever a tenant actually destroys the property demised he must restore it or compensate his landlord for its loss, unless, of

(1) 12 M. & W. 68.
(2) 12 M. & W. 52.
(3) 11 M. & W. 5.
(4) 2 Ex. D. 336.
(5) Law Rep. 6 Ex. 25.
(6) 1 C. P. D. 77.

1880

MANCHESTER BONDED WAREHOUSE COMPANY v. CARR.

course, in cases where destruction is contemplated, as in mines and quarries. We have no doubt that this contention is well founded where the destruction is wilful or negligent; but there is no authority to shew that it applies to destruction by using the property demised in what was apparently a reasonable and proper manner, having regard to its character and to the purposes for which it was intended to be used. On the other hand, this very question had to be considered by Mr. Justice Fry in *Saner* v. *Bilton* (1), and he came to the conclusion that in such a case the tenant was not liable for the destruction of the property. The question in these cases is whether it is the tenant's duty to ascertain what he can do with safety to the property, or whether he is not entitled to assume that it is fit to be used for the purposes for which it is let and for which it is apparently fit. We are of opinion that the latter is the true view, and that, in the absence of an express agreement to that effect, a tenant is not liable for the destruction of the property let to him if such destruction is in fact due to nothing more than a reasonable use of the property, and any use of it is in our opinion reasonable provided it is for a purpose for which the property was intended to be used, and provided the mode and extent of the user was apparently proper, having regard to the nature of the property and to what the tenant knew of it and to what as an ordinary business man he ought to have known of it. To hold a tenant liable for the destruction of the property by its reasonable use as above explained, would be to hold him liable for latent faults and defects in the property demised. We are of opinion that he is not liable for such faults and defects, in the absence of some express agreement on his part imposing such liability upon him. We are, however, of opinion, that primâ facie a tenant is bound to restore the property demised to him, and that if such property is destroyed by the acts of himself or his undertenants, the presumption is against him, and he must in order to exonerate himself shew that the destruction was owing to causes for which he was not responsible. If, therefore, this case should go back for trial, the jury should be directed in accordance with the above principles, and should be asked whether the loading of the warehouse in this

(1) 7 Ch. D. 815.

case was reasonable or unreasonable; and the jury should be told that the question cannot be decided simply by the fact that the warehouse fell from the overloading, but that they must inquire further and see whether there was, before the overloading took place, any reason for supposing that the goods put into the warehouse were too heavy in kind or quantity for its apparent strength or for its strength as known to the defendant, or as he ought as a business man to have known it.

Fifthly and lastly, we have to consider what liability, if any, the defendant is under by virtue of his express covenant to repair the inside of those parts of the warehouse which were demised to him. The inside does not in this case include the walls, roof, or main timbers, for these are to be kept in repair by the landlord. The defendant's covenant, however, extends to the rest of the inside of the floors demised to him; but this covenant is, we think, subject to the exception in case of damage by fire, storm, or tempest, or other inevitable accident, and reasonable wear and tear. Fire, storm, and tempest are out of the question; and we agree with Fry, J., in thinking that inevitable accident means some accident ejusdem generis, and does not extend to use of the property by the tenant: see *Saner* v. *Bilton*. (1) It only remains to consider whether reasonable wear and tear can include destruction by reasonable use. These words, no doubt, include destruction to some extent, e.g., destruction of surface by ordinary friction, but we do not think they include total destruction by a catastrophe which was never contemplated by either party. It follows that the defendant is liable under his express covenant to make good the cost of putting the inside of the floors demised to him and the fixtures therein in good and tenantable repair. We were told that there were no main timbers as distinguished from iron beams; whether this is so or not we are of opinion that iron beams are main timbers within the meaning of the lessor's covenant to repair, and that the tenant is not bound under his covenant to replace them. This we believe disposes of all the legal questions raised before us, and the case must now go back to be tried if the parties cannot agree about the facts, if any still in dispute, or on the measure of the defendant's liability under his express covenant.

(1) 7 Ch. D. 815.

1880

MANCHESTER BONDED WAREHOUSE COMPANY v. CARR.

GROVE, J. I agree with the judgment read, except that I have a small doubt whether the lessee is bound under the circumstances to pay for the inside repairs, and whether a covenant—not to put in repair, but—to maintain and keep in tenantable repair, is not based on the supposition that the landlords give the premises up in repair. This is here a trifling matter, as it does not affect the walls but only some painting and whitewashing.

LORD COLERIDGE, C.J. In deference to the authority of Fry, J., I concur in the judgment of the Court. If *Saner* v. *Bilton* (1) had been cited to me at the trial, I should have yielded to it, and I do so now, reserving so far as I may, my own opinion for some future occasion should the point in question again arise.

Case remitted for trial.

Solicitor for plaintiffs: *Worthington, for Sale, Seddon, Wilton, & Lord.*

Solicitor for defendant: *Marsland, for Addleshaw & Warburton.*

May 14.

[IN THE COURT OF APPEAL.]

THE CAPITAL AND COUNTIES BANK *v.* HENTY & SONS.

Defamation—Libel—Expression of lawful Intention—Innocent Meaning of Writer—Injurious Imputations inferred from Words—Innuendo—Evidence of—Privileged Occasion—Express Malice.

The plaintiffs were the "Capital and Counties Bank," which had a branch at Chichester and other branches in Sussex and Hampshire. The defendants were brewers at Chichester, and had many customers and tenants occupying public-houses in different parts of the same counties. These customers and tenants were accustomed to cash cheques for persons who visited their houses, and afterwards to hand the cheques, which were drawn on various banks, to the defendants' collector in payment of accounts. The collector used to pay the cheques in to the plaintiffs' account at the Chichester branch bank, where the cheques were received as of course. But a new manager of that branch bank objected to cash such cheques as were drawn on other branch banks. The defendants informed him that if he would not do so they should issue an order to their tenants not to cash cheques of the plaintiffs' bank, at least with the intention of paying the collector with them. The manager replied that he must certainly decline to cash cheques on the other

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(1) 7 Ch. D. 815.

branches of the bank when presented by parties unknown to him, though as a matter of grace he was quite willing to cash cheques to the defendants' representatives if properly introduced to him, with proof that they had power to sign for the defendants' firm, and that he was quite indifferent as to their sending out orders to their tenants not to cash the plaintiffs' cheques. Thereupon the defendants caused to be printed and sent to 137 of their customers and tenants aforesaid the following circular:—

"Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank."

This publication of the circular caused a run on the bank and loss to the plaintiffs. They brought an action for libel. The statement of claim set out the circular as the libel, and alleged by an innuendo the meaning to be that the plaintiffs were not to be relied upon to meet the cheques drawn upon them, and that their position was such that they were not to be trusted to cash the cheques of their customers. At the trial the question of libel or no libel was left to the jury, with a direction that the circular, if, under the circumstances, libellous, was published on a privileged occasion, unless there was express malice. The jury failed to agree, and were discharged. On motion to enter judgment for the defendants:—

Held, by the Common Pleas Division, that the circular was capable of the meaning alleged, and there was evidence to support the innuendo and also of express malice, and the case must go again to a jury.

On appeal:—

Held, reversing the decision of the Court below (Thesiger, L.J., dissenting), that there was no evidence that the circular was defamatory in either a primary or a secondary sense, and that, even if there was any such evidence, the circular was issued on a privileged occasion, and there was no evidence of express malice.

Affirmed by H. of L. 7 App. Cas. 741.

ACTION FOR LIBEL.

The Statement of Claim alleged that: The plaintiffs were bankers and the defendants were brewers.

The defendants falsely and maliciously wrote and published of the plaintiffs the letter following:—.

"Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank (late the Hampshire and North Wilts). Westgate. Dec. 22nd, 1878," meaning thereby that the plaintiffs were not to be relied upon to meet the cheques drawn upon them, and that their position was such that they were not to be trusted to cash the cheques of their customers, whereby great damage had been caused to the plaintiffs, who claimed 20,000*l*.

The defendants, in their Statement of Defence, denied that they falsely and maliciously wrote and published the letter, but admitted that they wrote and published it under circumstances

1880

CAPITAL AND COUNTIES BANK v. HENTY.

which were set forth and are hereafter stated, and the defendants denied that it was a libel and denied the innuendo, and pleaded that the occasion of publication was privileged.

At the trial before Lord Coleridge, C.J., and a special jury the following facts appeared:—

The plaintiffs were bankers. Their bank had its head office in London, and various branches in Sussex, Hampshire, and elsewhere. One of the branch banks was at Chichester. The defendants were brewers at Chichester, and had customers and tenants occupying public-houses in different parts of the counties of Sussex and Hampshire. Accounts due to the defendants were paid to their collector by the customers and tenants, who were accustomed to hand to him in payment cheques which they had cashed for persons visiting their houses. These cheques were drawn on various banks. The collector had been in the habit of paying the cheques in to the plaintiffs' account at the Chichester branch of the Capital and Counties Bank, where they were cashed as of course. In 1878, however, a new manager came to that branch, and he objected to carry on the practice of his predecessors, refused to cash a cheque for 5*l.* drawn on another branch, and said that he would only cash at the Chichester branch cheques drawn on the Chichester branch bank. On the 26th of November, 1878, the defendants wrote to him: "Sir, It has always been our practice to cash the cheques drawn on the local or district branches of the banks of this city, and with that understanding we have allowed our tenants to cash such cheques and to give them to our collector. If you intend to adopt an isolated policy we shall issue an order to our tenants not to cash Hampshire and North Wilts cheques, at least with the intention of paying our collector with them. Our Mr. Wright will early to-morrow (Wednesday) present the cheque that you refused to cash to-day, and on it will depend the good feeling that has existed between us and the Hampshire and North Wilts Bank." On the 29th of November the defendants' manager wrote to the plaintiffs: "In reply to your favour I beg to inform you that I must certainly decline to cash cheques on other branches of our company when presented by parties unknown to me, though as a matter of grace I am quite willing to cash cheques to your representatives if properly introduced to me, with proof that they

have power to sign for your firm. I am quite indifferent as to your sending out orders to your tenants not to cash our cheques." Thereupon the defendants had printed and sent to 137 of their customers and tenants occupying public-houses the following circular: "Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank, late the Hampshire and North Wilts. Westgate, Dec. 22, 1878."

This caused a run on the bank to the extent of 277,000*l.*, and its business was prejudicially affected. During the year 1878 only three cheques drawn on other branches had been presented at the Chichester branch by the collector. One of those cheques was for 36*l.*, a second for 6*l.*, and the third was the 5*l.* cheque above mentioned.

On the 5th of December the plaintiffs' solicitor wrote to the defendants: "The attention of the Capital and Counties Bank has been called to a printed circular published by you. [It was here set out.] As this circular is calculated seriously to injure the bank, I will thank you to give me some explanation of your act to guide them in their future course relative to this matter." The defendants, on the 6th of December, replied: "In answer to yours of the 5th, the circular that we sent to our tenants was in consequence of a letter from Mr. Hooper, the manager of the Capital and Counties Bank in this city, dated November 29th, and we disclaim all intention of injuring the bank, with whom we have always got on well previously." On the 7th of December the plaintiffs' solicitor answered: "Since I wrote you on Thursday I find that the consequences are so serious to the bank that no delay must take place in taking active steps. I would suggest, indeed I must ask you to let me know the name of your solicitor, with whom I must have an interview not later than one o'clock on Monday, or I must issue a writ. I write this peremptorily, as the matter brooks of no delay. You have no idea of the effect of your circular. Your solicitors must see me, I cannot go to them." The defendants wrote on the same day: "Your letter of this date to hand, and in reply thereto we must decline to discuss the matter further."

The Lord Chief Justice left to the jury the question whether

1880

CAPITAL AND COUNTIES BANK v. HENTY.

the circular was a libel or not, and held that, if it was, the publication of the circular was on a privileged occasion, and directed them that there was no pretence for saying that the letter, if it meant the innuendo, could be justified, and that it was for them to say whether, if that was the sense, there was not express malice.

The jury failed to agree, and were discharged without giving a verdict on the questions submitted to them.

March 10. *Herschell, Q.C.* (*A. L. Smith,* with him), for the defendants, moved in the Common Pleas Division to enter judgment for the defendants on the ground that the Court had before it all the materials necessary for finally determining the question in dispute in the action, and that, upon such, the defendants were entitled to judgment.

The words of the circular are not defamatory. They were intended to state, and they state only, the fact that the defendants would not in future take in payment cheques drawn on any of the branches of the plaintiffs' bank. The defendants never meant to impute insolvency. It is not even suggested that they did so. Their words do not naturally bear the meaning put upon them by the innuendo. The question in such case is what the writers of the circular meant, and not what inference might be drawn from it.

[GROVE, J. But suppose the alleged libel would convey to the mind of an ordinary person an imputation of instability or insolvency, could the defendants justify by saying that they did not mean to impute it?]

Yes. If there had been no innuendo here the claim would clearly have been demurrable.

[DENMAN, J., referred to *Cox* v. *Cooper.* (1)]

There must be a distinct averment that the words, if they are not actionable in themselves, bear a specific meaning which is actionable: *Cox* v. *Cooper* (1); and if such specific meaning is alleged in an innuendo, evidence must be given in support of it to shew that the meaning alleged is the meaning intended to be conveyed. It is not enough to shew that such an inference might be drawn or that it would be reasonable to draw it from the words

(1) 12 W. R. 75.

used. A man to whom a cheque on a certain bank is tendered may surely say "I will not take a cheque on that bank," although possibly some inference unfavourable to the bank might be drawn from the refusal. Stronger still would be the justification of a man in saying so when he had previously been in the habit of receiving such cheques from many persons and wished to discontinue the practice. It would be less prejudicial to announce the intention beforehand than to wait until cheques were presented and then reject them. The defendants ought not to be held liable for false inferences which others may draw.

[DENMAN, J., referred to *Mulligan* v. *Cole*. (1)]

There the words of an advertisement being that the plaintiff was no longer authorized to receive subscriptions, he was nonsuited on the ground that there was no evidence to support the innuendo that he had falsely pretended to be authorized to receive them, and the Queen's Bench Division upheld the nonsuit and Lush, J., put his judgment on the ground that the advertisement was incapable of supporting the innuendo. The circular here will not bear the meaning alleged in the innuendo, which is not the natural and necessary meaning of the words.

[DENMAN, J. Another case deciding that whether the words are capable of the meaning alleged is a question for the Court is *Blagg* v. *Sturt*. (2)]

Yes. A secondary meaning is alleged, and it was therefore for the plaintiffs to prove by evidence of surrounding circumstances that the words might bear that meaning. But there was no evidence on which a jury could properly find that the words had any other than their primary and natural meaning. Even if the defendants knew that the cashing of the plaintiffs' cheques by the public-house keepers was an advantage to the plaintiffs, and yet wished to injure them by depriving them of it, the defendants would not be liable for issuing this circular, which expresses their true intention to receive no such cheques. A man may write "I will no longer deal with that tradesman A., but will deal with tradesman B.," and it matters not what the motive or purpose of the writer is. He is entitled to disregard the inferences which other persons may draw from his conduct.

(1) Law Rep. 10 Q. B. 549. (2) 10 Q. B. 899, 906.

1880

CAPITAL AND COUNTIES BANK v. HENTY.

C. Russell, Q.C., and *R. T. Reid*, for the plaintiffs, shewed cause. The question was for a jury, and as they could not agree and have been discharged there must be a new trial.

The evidence shews that the defendants in publishing the circular acted recklessly, and were careless as to the meaning they conveyed and damage they caused. There was no sufficient reason for issuing the circular. The cheques on other branch banks presented by the defendants at the Chichester branch bank during 1878, were only three, and for small sums. Yet no less than 137 circulars are issued, applying not only to cheques on branches, but to all cheques on the plaintiffs' bank, and containing no such statements as might easily have been inserted to save the credit of the bank. The circulars were likely to be shewn by the recipients to their customers. Great damage was the immediate result, and when informed of it the defendants took no steps, as they might have done, to stop the run on the bank, and to restore the confidence which their act had shaken. The question is not what the defendants meant by the words used, but what effect would they, under the circumstances, produce on the minds of reasonable persons. The meaning which reasonable persons would put on the words is decisively proved by the effect they actually produced. It is fallacious to say that an expression of intention to do a lawful act cannot be a libel. A man may have a right to signify his intention to do a lawful act, but has no right to express his intention in terms which are capable in the opinion of the jury of being libellous.

[DENMAN, J. It is not illegal to say orally of a woman that she is adulterous, and no action will lie for saying so; but would it not if a man wrote, "I intend to say so in public?"]

Probably. If the words used are capable of a libellous meaning, it is not necessary that the exact innuendo alleged should be found. In *Mulligan* v. *Cole* (1) there was no evidence to shew that the libel bore the meaning ascribed to it. Here there was the strongest evidence of it.

An announcement of a lawful intention must be libellous if it defames. Nor is it prevented from being libellous because an inference has to be drawn. For example, it might well be

(1) Law Rep. 10 Q. B. 549.

libellous to write of a man, "I will never introduce him into the society of ladies again." If the occasion were privileged, here there was abundant evidence of malice. The letters of the defendants shew they had ill-feeling. The 5*l.* cheque was presented and cashed. But nevertheless they published the circular on account of the manager's letter.

[GROVE, J. But is malice in mind enough. Suppose a master hates his servant, yet speaks ill of him on a privileged occasion, bonâ fide believing it to be a duty to do so?]

Mere dislike in mind would not be express malice. The defendants knew of the damage, and did not stop it as they could have done by a line or two. The Court cannot say there was no evidence of express malice.

Herschell, Q.C., replied.

GROVE, J. This was an action for libel tried before Lord Coleridge, C.J., and a special jury, and the alleged libel was published under these circumstances: The defendants, who are brewers, have either as tenants or mortgagees in the nature of tenants to them, several public-house keepers in and near Sussex, and had been in the habit of receiving from those persons cheques upon different bankers, but more particularly upon the plaintiffs' bank, and of paying them into the Chichester branch of the Capital and Counties Bank, which has several branches. A new manager was appointed to the bank and some difference arose, and he declined to cash cheques or to receive cheques, except those which were drawn upon the Capital and Counties Bank, Chichester branch. As I understand, he did not decline to cash the cheques drawn on the Chichester branch, but declined to cash cheques (which he was not bound to do by the rules of the bank) drawn upon other branches of the Capital and Counties Bank. Thereupon the defendants sent to their so-called tenants and also to other persons —certainly to two who were not tenants but who were customers, for they bought beer from Messrs. Henty & Sons—this circular: "Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank, late the Hampshire and North Wilts Bank."

1880

CAPITAL AND COUNTIES BANK v. HENTY.

Grove, J.

At the trial Lord Coleridge, C.J., held that the occasion upon which this circular was sent was privileged, but he left to the jury the question whether the circular, viewed with surrounding circumstances, was libellous, and whether there was express malice taking it out of the privilege. It is unnecessary, for the present purpose, to decide whether it was privileged. I will assume in this judgment that it was, though I express no opinion myself on the question of privilege.

The questions before us are two, or, I may say, three. First. Is this circular, taken by itself, capable of being libellous? Suppose it were put in evidence and the writing and publication of it proved and no other evidence given, could a judge say this circular was incapable of being libellous? That is one question. Secondly. Assuming that a judge could not say so upon demurrer, or upon mere proof of writing and publication by the defendants, is it a case in which evidence could be given to prove that it was libellous, and that those writing the circular intended to convey any such imputation as is mentioned in the statement of claim by way of innuendo, and, if so, was there evidence which ought to be submitted to a jury? Thirdly (taking this as a subdivision), was there any evidence of express malice, assuming the occasion to be privileged?

First, then, can the circular upon the face of it be pronounced by a judge to be incapable of receiving a construction which makes it libellous? The strongest case cited was *Mulligan* v. *Cole* (1), referred to by my Brother Denman. There is however a considerable difference between the nature of the alleged libel in that case and this. The libel in *Mulligan* v. *Cole* (1) was published in the Walsall newspapers on behalf of the Walsall Science and Art Institute, and was as follows: "The public are respectfully informed that Mr. Mulligan's connection with the institute has ceased, and that he is not authorized to receive subscriptions on its behalf." That was signed by the defendants as officers of the institution. The innuendo was that the plaintiff falsely pretended to be authorized to receive subscriptions on behalf of the institute. Quain, J., who tried the case, after hearing certain evidence nonsuited the plaintiff, and on a rule for a new

(1) Law Rep. 10 Q. B. 549.

trial, Mellor, Lush, and Quain, JJ., although being of opinion that the advertisement without the innuendo would not have been defamatory, held that the evidence did not support the innuendo; that was the real ratio decidendi. Moreover, I may add, that to hold this circular per se capable of receiving a defamatory meaning, would not be nearly so strong as a similar decision in the case of *Mulligan* v. *Cole* (1) would have been, for it would be a most far-fetched inference to say that because the defendants informed the public that the person connected with their institution had no further connection with it, that statement per se without any inference and innuendo meant that the plaintiff falsely pretended to be authorized to receive subscriptions and was therefore per se libellous. Surely a person may tell the public that a man who had been in his employ and who is generally known as his agent has ceased to be so. But it is unnecessary to give any opinion supposing the absence of an innuendo, for the question resolves itself into this: there being in this case an innuendo, the substance of which was that the circular was intended to convey that the Capital and Counties Bank was either in an insolvent or in a doubtful condition and not to be trusted to cash the cheques of its customers, is there evidence that the innuendo can fairly be supported as attaching to this circular, in other words can the circular reasonably bear that meaning viewed by itself, and with regard to the surrounding circumstances and the relations of the parties? I am of opinion there was evidence to that effect and therefore that the case was one which was properly submitted to the jury. How they ought to have found I do not say, as that is not the question for us to decide. They were discharged, and the case comes before us on motion for judgment on the ground practically that there was no case to go to the jury. I am of opinion that there was a case for the jury.

Let us look at the alleged libel itself and at the relations of the parties. The defendants had for a considerable time dealt with the bank in the way I have described. Quarrels or disputes arose from the manager refusing—not to cash all cheques, but—to cash cheques which were not drawn on the Chichester branch of the

(1) Law Rep. 10 Q. B. 549.

1880

CAPITAL AND COUNTIES BANK v. HENTY.

Grove, J.

bank. Then the defendants sent this circular to their tenants as they were called, and to their customers also. I think it not unimportant to observe that the circular is not a notice to the individual, "Do not send me any more cheques for I have been put to trouble through Messrs. Henty objecting on the ground of inconvenience to cash cheques not drawn on the Chichester branch," but the notice, though sent to individuals, is a general printed circular and in terms not only wide enough to mean, but read in their ordinary sense, meaning that the firm will not receive in payment from anybody cheques drawn on the Capital and Counties Bank. That is a circular in very large terms. It is not as was first thought, "Messrs. Henty & Sons hereby give you notice that they will not receive from you cheques in payment," but it is "Messrs. Henty & Sons, hereby give notice that they will not receive in payment cheques on any of the branches of the Capital and Counties Bank." Therefore this would be likely to come to the knowledge of many other persons than merely these tenants. It is a printed circular, very many copies might have been struck off; it might lie on the tables of the defendants' customers or might even, if the customers were malicious, be put up over their mantelpieces, and so do great damage.

It states that the defendants will not receive any of the Capital and Counties Bank cheques. Coupling this with the fact of disputes with the bank, and the fact that a large number of persons read the circular in that sense, might it not reasonably be taken that the circular was read in the sense that the bank was untrustworthy, for it is said that there was a run on it to the extent in one month of 277,000*l.* I do not say that is conclusive, but it is some evidence of the natural or probable result of the way in which other persons, uninterested beyond their own personal interests in reading it in any particular way, would read it.

Further, the circular was written upon an occasion after the cheque which gave rise to the dispute had, in fact, been cashed. But this perhaps goes mainly to the question of malice, as does also the evidence of the correspondence between the solicitor of the plaintiffs and the defendants.

I do not agree with Mr. Herschell that what is in the mind of

a person is the test of this question, but that the test is what inference would be drawn by a person reasonably reading a circular of this description,—what is the result likely to be produced on his mind? If the defendant is doing an act perfectly justifiable on his part the consequences must take care of themselves. But there seems to me to have been no necessity and nothing to call for a circular of this kind being sent out for the mere protection of the defendants. It would have been amply sufficient for their protection if they had told their customers or their tenants that they would not receive the cheques in payment. But to send a general circular round to a large number of persons stating that the defendants will not receive, as I read it, from anybody cheques drawn on any branch of the Capital and Counties Bank seems to me evidence of an intention in the sense in which I use the word "intention," viz., that this circular shall be read by the person reading it in a sense injurious to the interests of the Capital and Counties Bank, that document not being confined to the fair necessities of the defendants' own position, but having, and necessarily having a much wider inference than they supposed.

I cannot, therefore, say that this is a document incapable of having the sense affixed to it which is suggested by the innuendo, and that there was not evidence for the jury to consider on the question whether the circular really had not that effect, and that the jury, the proper judges of whether it is a libel or not, might not be directed to read it themselves, to look at the relations of the parties and the surrounding circumstances, and to say whether it is libellous or not. It seems to me that if a judge were to take the circular away from the jury on the ground that it was incapable of being libellous, or that there was no evidence that it was so, the judge would be going far beyond his duty, because it is clearly established that the question of libel or no libel is a question for the jury, and the judge could only withhold the case from them when, taking the innuendo and the libel together, he can say it is incapable of being so treated and is not a libel.

On the question of express malice, to which much of the evidence applies, there was a question for the jury. It will be for them to decide, and I do not say, what the verdict should be. I take "express malice" to mean this: that it is not enough to

1880

CAPITAL AND COUNTIES BANK v. HENTY.

Grove, J.

say that the person publishing the libel disliked, or in his own mind internally wished to injure a person, because a person may do perfectly right acts and yet may dislike the person with reference to whom he does them; there must be something in the act of the person to shew that he published the libellous matter not honourably and not with a view of doing that which was right, but with a bye motive, and that he did publish such a document knowing or believing that it would have the effect of doing what it ought not to do, namely, injury to the person not merely because he deserved to be injured or to be punished as an act of justice, or anything of that sort, but with the view of doing him an injury. I think there is evidence of that.

The circumstances are not such as it seems to me to call for so strong an act as the publication of the circular. The manager said that which he had a primâ facie right to say and do, viz.: "I will not undertake to pay cheques drawn on all the branches, because I have no means of inquiring and ascertaining whether the persons drawing the cheques are solvent or not. Let them go to the branch where they may have assets. Whether they have assets there or not I cannot tell." That is a conduct of business which is sanctioned by the law with regard to the indorsement of cheques. A banker is liable where a cheque purporting to be by one of his customers is forged, for he is bound to know the handwriting of his customers, but he is not liable where the indorsement is forged, because he cannot know the handwriting of everybody to whom a cheque to order is given. It was a very fair thing for the manager to say, and there was nothing done on his part to call for this widespread circular from the defendants. I think that is evidence of malice. Their subsequent refusal to do anything to mend the damage which the defendants evidently knew had taken place is also some evidence, and I think the fact of the great loss of the bank being brought to their notice, and their not doing anything to stop the loss should be called to the attention of the jury. It is evidence shewing what the motive was. There are other elements in the case, as for instance the needless character of the circular saying that the defendants will not receive the cheques drawn on any of the branches of the plaintiffs' bank. I think the circular is evidence for the jury of express malice.

Therefore, without expressing any opinion on the question of privilege, I think there was evidence on both those other questions, and that the Lord Chief Justice was right in leaving this to the jury. The result of the case is that there must be a new trial, and that we cannot enter judgment for the defendants.

DENMAN, J. I am of the same opinion.

This, it must be remembered, is not a case in which the question is whether the new trial should be granted after a verdict of the jury, but it is an action for a libel which the plaintiffs set out, and upon which they put certain innuendoes, and the question of libel or no libel, and whether the innuendo was made out, has been left to the jury, who have declined to find any verdict upon either of those questions which primâ facie are, more, perhaps, than any others known to the law, questions for the jury.

It has been contended by Mr. Herschell that, notwithstanding the discharge of the jury upon those two primâ facie vital points in an action for libel, we can, at this stage, see that there was no case for the jury; that the learned judge would have been justified in nonsuiting; and that we can now therefore give judgment for the defendants. I think we cannot do so. [The learned judge referred to the terms of the alleged libel and innuendo.] The objection taken for the defendants is first that the words of the notice itself were incapable of bearing the meaning put upon them by the innuendo; and, secondly, that even if capable of bearing that meaning there was no evidence that they were used in the sense put upon the words by the innuendo.

An action for libel is of all others the most difficult for a Court to deal with by taking upon itself to decide the whole question without any finding of the jury; because, as I have said, the question of libel or no libel is peculiarly a question for the jury. In the first place, the argument was relied on that the words of the alleged libel are words really asserting an intention of doing that which the defendants legally would have a right to do, and that therefore they did not necessarily impute anything at all; that the statement was a mere assertion of intention, and, therefore, that the words are incapable of being libellous. I think that from the illustrations put both by my Brother Grove

1880

CAPITAL AND COUNTIES BANK v. HENTY.

Denman, J.

in the course of the argument, and also by Mr. Reid who ably argued, following Mr. Russell, on behalf of the plaintiffs, it is perfectly plain that the mere fact that the words contain only the expression of an intention, even though it be a lawful intention, cannot be held to make the words incapable of amounting to a libel. Many cases have been and more could be suggested in which words might be expressive only of a lawful intention, and yet cause an injury to a person and be libellous, take, for example, the words, "I intend to prosecute J. S. for felony at the next assizes."

Are the words, then, in this notice libellous? If persons reading them might gather from them that they meant to impute that Messrs. Henty & Co. looked upon the Capital and Counties Bank as an untrustworthy bank, and this circular was sent to one hundred and forty-five persons who had received cheques from that and other banks, and were likely, but for such a notice to pay them to Messrs. Henty & Co. in respect of their rent or other dues, it appears to me that it is impossible to say that the words are incapable of having an injurious effect, and of being fairly considered libellous by a jury in the county in which those words are spread.

The cases relied upon seem to me by no means to decide this point in favour of the defendants. The first was *Cox* v. *Cooper* (1), to which I called Mr. Herschell's attention. But all that was decided by that case was, that supposing the words are absolutely innocent words in themselves, and simply state something which is not on the face of it a wrong act by the person complained of, then, unless the words are explained by innuendo, they must be taken in their ordinary sense, and it is possible, even on demurrer, for a Court to say the action for libel will not lie. That is a strong decision undoubtedly, and by a very learned judge, Mr. Justice Wightman, on demurrer, but it does not meet this case. The other case, which has been mainly relied upon, *Blagg* v. *Sturt* (2), is, I think, clearly distinguishable. There, in accordance with the view of the Court below, Wilde, C.J., says: "Undoubtedly it is the duty of the Judge to say whether a publication is *capable* of the meaning ascribed to it by an innuendo: but," adds the learned

(1) 12 W. R. 75. (2) 10 Q. B. at p. 908.

Lord Chief Justice, "when the Judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it."

Taking that to be the law and it to be our duty to form a judgment on the question whether the words alleged to be libellous are capable of the meaning given to them by the innuendo, it is impossible for us in this case to decide that they are not so, without going very much further and forming a precedent which would be detrimental and contrary to the whole doctrines of the law on the subject. It would be putting ourselves in the position of a jury, and deciding the question of libel or no libel, a matter of fact.

Words must have different meanings according to the apprehensions of the people amongst whom they would be circulated, and according to the different relations between the parties, and must be construed by the circumstances of each particular case which the jury have to inquire into before they put their construction on the alleged libel. It cannot be taken as a bare matter of law, or as a document to be construed by the Court, but must be taken, at most, as a complex question for the Court and jury, upon which the jury might have to hear a great deal of evidence on both sides before they could determine whether it is a libellous document or not. I think, therefore, we cannot undertake to say that the document in question was incapable of being libellous. The case of *Mulligan* v. *Cole* (1) seems very clearly distinguishable. It appears to be in accordance with the view of the Court there that the advertisement was incapable of the defamatory meaning put on it by the innuendo. It was impossible to give the words the meaning alleged in the innuendo without violently straining the ordinary meaning of the words. That case was, I think, very much stronger than the present one. Here the question is open as to what such a statement may mean. The words in the circular are, without doing any violence to the language used, open to the construction put upon them, viz., that they meant that the cheques drawn on the plaintiffs' bank were worthless as the bank would be unable to pay them. It is a not unimportant fact that in stating that they

(1) Law Rep. 10 Q. B. 549.

1880

CAPITAL AND COUNTIES BANK v. HENTY.

Denman, J.

will not receive these cheques in payment the defendants do not only say (though the circular is only sent to their customers) that they will not receive cheques drawn on such bank, which may mean, and may have been intended to mean, and to be understood as meaning, cheques of the bank by whomsoever presented by way of payment. I do not mean to say that if I had to construe this as a juror, I should say it ought to be so construed. I do not say that if I were a juror I should not construe this in a narrower sense, and say that it was intended to apply only to those persons to whom it was sent, and for those persons who were likely to pay money to Messrs. Henty in cheques of the bank. But I am not at all sure a juror would take that view if the circular were coupled with the other evidence in the case, nor am I prepared to say that the jury might not come to the conclusion that the circular was intended to bear the other construction. It may have such a meaning. Not that I think it had, but that is a question for the jury. It is not a question for me, nor a question with which Courts in actions for libel are competent to deal.

Then it is said that even if the words were capable of such construction there was no evidence that they were used in the sense alleged by the statement of claim. It appears to me that if not used in the sense put upon the words by the innuendo, there would probably be no libel at all. I feel very strongly that the only libellous sense in which those words could have been used would be that put on them by the innuendo. But I also think that it is impossible to say that there was no evidence that they were used in that sense. The jury may look at the whole circumstances, and it is a fair argument to use that in this particular case there is evidence of many persons having put that construction upon the libel. But of course such evidence is not conclusive, as it does not follow that, because persons may have put a construction on the libel which might be a very far-fetched construction, it would be so construed by a jury. Still the fact of many persons having construed it in the sense attributed to it by the innuendo affords at least a strong argument to shew that that is a construction which might not unreasonably be put upon it. That again is purely a question for the jury. The case of *Mulligan* v. *Cole* (1) went to

(1) Law Rep. 10 Q. B. 549.

the jury, and there the learned judge directed a nonsuit, on the ground that the advertisement was not capable of the innuendo suggested, which was an allegation of a meaning which it would have been absurd for a jury to find in the libel, and there was no evidence to connect the libel with other facts in the case, so as to shew that the alleged meaning was contained in the libel. Under those circumstances the Court directed a nonsuit. That is undoubtedly a strong case, perhaps the strongest which is to be found, and one not easy to reconcile with the authorities establishing that the question of libel or no libel is for the jury. It is to be noticed, undoubtedly, that two of the learned judges in that case both put their decision—and one of them with great hesitation—on the ground that the plaintiff had failed to give any evidence that any other meaning was to be attached to the words of the advertisement than that which they would primâ facie bear. Its natural meaning was perfectly innocent, and there was no evidence justifying any stronger one. I think that in the present case there was some evidence to go to the jury in support of the innuendo, and the matter not having been decided ought to be submitted to a jury. Being of this opinion and to avoid any prejudice at the trial, I will not say anything on the question of express malice, which will in substance be the same question as the other, or whether the learned judge was right or wrong in ruling that on the particular occasion the publication was privileged.

Motion refused with costs.

The defendants appealed.

April 22. *Sir H. S. Giffard, S.G., Herschell, Q.C.,* and *A. L. Smith,* for the defendants.

Sir John Holker, A.G., and *Goldney,* for the plaintiffs.

The same arguments were used as in the Court below, and in addition to the cases there cited the following were referred to, viz.: for the defendants: *Daines* v. *Hartley* (1); for the plaintiffs: *Fisher* v. *Clement* (2); *Baylis* v. *Lawrence* (3); *Parmiter* v. *Coupland* (4); *Harvey* v. *French.* (5)

Cur. adv. vult.

(1) 3 Ex. 200.
(2) 10 B. & C. 472, at p. 475.
(3) 11 A. & E. 920.
(4) 6 M. & W. 105.
(5) 1 C. & M. 11.

1880

CAPITAL AND COUNTIES BANK v. HENTY.

May 14. THESIGER, L.J. This is a case which to my mind presents considerable difficulty, and upon which I am unable to form any confident opinion. The Court is asked to say, and hold that upon the evidence given at the trial, there was no case proper to be submitted to the jury in support of the action, and consequently that Lord Coleridge at the trial, and the Court below, ought to have directed judgment to be entered for the defendants. The contention for the appellants is that the plaintiffs failed to give primâ facie proof that there was any libel at all and, if there was a libel proved, that it was on an occasion which rendered it privileged in the absence of proof of express malice, and failed to give primâ facie proof of such malice.

Upon the question of libel or no libel, it is urged that the document alleged by the plaintiffs to be a libel, is nothing more or less than an act done, lawful in itself, and which could only be done by verbal or written communication; that the persons to whom it was sent by the defendants, might very possibly or even probably speculate upon the motives which prompted the act, and form an opinion therefore more or less favourable to the plaintiffs, according to the tendency of their minds, but that the document itself involves no statement of the motives, and cannot be read as conveying any imputation upon the plaintiffs. It is argued that it would be highly inconvenient if, under such circumstances as exist in the present case, a person were unable to say or write that he would not take the cheques of a particular bank without exposing himself to an action for defamation, in which the words spoken or written, although no more than he was obliged to use, in order to carry out the act, must be taken as defamatory, and although the occasion might render them privileged, would expose him to the risk of a jury, upon some slight evidence against him, finding that he was actuated in speaking or writing the words by some bye or indirect motive, and was therefore not protected by this privilege. This inconvenience may indeed be most strongly illustrated, by supposing a case in which a man is prompted to do the act in question, and to speak or write the words constituting it, by the belief that the particular bank referred to is in failing circumstances. He may purposely avoid stating the motive which influences him with the view of not injuring the bank unnecessarily,

and yet what he says or writes is to be treated as equally defamatory with a document in which he states the motive. I fully feel the force of these considerations. But, on the other hand, I cannot shut my eyes to the fact, that words spoken or written which constitute an act lawful in itself, and which, so far as language is concerned, go no further than is necessary to do the act, may be used as a vehicle for conveying the most serious imputations upon the character or credit of the persons to whom they relate. There may be, and is, a perfect right on the part of any person to refuse to take the cheques of a particular bank; but if such person publishes his intention not to take them, in places where, and to persons from whom he never did receive, and never is likely to receive any such cheques, I cannot doubt that his statement might justly be found by a jury to be defamatory, as casting and intended to cast a slur upon the credit of the bank. But this can only be by reason of the words spoken or written being capable of being heard or read in a defamatory sense, and if it be allowed that they are so capable, then it would seem to be a question for the jury, whether, looking to the particular circumstances of the case, the words spoken or written constituted merely an act done, carrying with it no statement of the motive leading to the act, involving no defamatory meaning, or were intended solely, or in conjunction with the act, to convey and did convey such a defamatory meaning. The case of *Mulligan* v. *Cole* (1) is no authority to the contrary. There the plaintiff having been a certificated Art Master at the Walsall Science and Art Institute, left his employment and took a similar one in an institution having a kindred name in the same town. An advertisement was inserted by the defendants, the chairman, treasurer, and secretary of the institute, in a Walsall paper, to the effect that the plaintiff's connection with the institute had ceased, and that he was not authorized to receive subscriptions "on its behalf;" and such advertisement was held not to bear the meaning put upon it by the innuendo in the pleadings, that the plaintiff falsely assumed and pretended to be authorized to receive subscriptions on behalf of the said institute. But Mellor, J., rested his judgment upon the absence of any evidence indicating that

(1) Law Rep. 10 Q. B. 549.

1880

CAPITAL AND COUNTIES BANK v. HENTY.

Thesiger, L.J.

the language of the advertisement was intended to bear a defamatory meaning, while Lush, J., doubtingly held that the case was rightly withdrawn from the jury, on the ground that the advertisement was not capable of the sense put upon it by the innuendo. He said that it could not be read as meaning more than to prevent the mistakes which might arise from the plaintiff's connection with a similar institution to that he had left, just as on a dissolution of partnership, a notice that only one of the partners is authorized to receive debts due to the firm, could never be suggested as meant to imply that the other partners had been improperly collecting the debts. Such a case, however, is in my opinion different from the present.

It is argued that the fact of a circular constituting the alleged libel having been only published by the defendants to persons who had sent, or were likely to send cheques of the plaintiffs' bank in payment of their accounts with the defendants, conclusively shews that the document ought not to be read as conveying any defamatory meaning. The fact is no doubt one which, as a fact, ought to weigh most heavily with either judge or jury, still more when coupled with the facts which exist in this case bearing favourably upon the conduct and intentions of the defendants. But the absolute refusal to take the cheques upon any of the branches of the bank may reasonably be taken to import, in the absence of any explanation, that it is unsafe to do so, and when upon the evidence it appears that the defendants were in consequence of the action of the manager of the Chichester branch of the bank in a state, however natural, of some irritation, that in refusing to take the cheques even when drawn upon the Chichester branch they went, however lawfully they might do so, beyond what was necessary to meet the difficulty which had arisen, and, lastly, although business men necessarily knowing how delicate and easily affected is the credit of a bank, and having a motive for their conduct which, if stated, would have removed any possible misunderstanding of the real meaning of the circular, refrained from stating or did not state that motive, I feel that these circumstances, although they may be but slight indications of such an improper intention as is attributed to the defendants in sending out the circular limited as its publication was to their customers, and even subject to

selection as regards them, are still circumstances which render it difficult to say that there was no evidence to go to the jury that the circular was used and understood as defamatory. I do not for a moment wish to be supposed to intimate that I should myself come to such a conclusion, or have necessarily been satisfied with a verdict to that effect. I merely say that I think that the question of libel or no libel is under the circumstances of this case one which should be submitted to a jury. Such a question, when turning, as it does in this case, upon the purport of what is alleged on the one side to be a mere business document, and on the other a defamatory libel, and which has to be read in the light thrown upon it by the relations and conduct and according to the understanding of business men, is one upon which, in my opinion, a jury is better qualified than a judge to form a sound opinion, and under the circumstances, and not being able to satisfy myself that there was not some evidence proper to be submitted to the jury upon the question, I think it safer to adopt the view of Lord Coleridge and of the Court below that there was. But if this view be correct, looking to the reasons on which it is founded, it carries with it as a consequence the further view that there was evidence to go to the jury of express malice, sufficient to deprive the defendants of the privilege which it was considered, and in my opinion rightly considered, by Lord Coleridge arose from the occasion on which and the persons to whom the circular was sent. The matter appears to me to stand thus: If the circular were to be found by a jury to be a libel at all it could, in my opinion, only be so found by reason of its being intended by the defendants as well as understood by those to whom it was sent by them to impute something disparaging to the credit and stability of the bank; and if it be found to be a libel in that sense, it follows that the defendants were actuated by improper motives in publishing it, for they knew that there was no ground for suspecting either the credit or stability of the bank. On the other hand, supposing for argument's sake that the circular were of such a clearly defamatory character as that it could and ought to be so held, whether those publishing it really meant it as such or not, upon the principle that persons must in law be presumed to intend the natural consequences of their acts, then the same facts to which I have referred

1880

CAPITAL AND COUNTIES BANK v. HENTY.

Thesiger, L.J.

as constituting some evidence that the defendants did intend by the circular to cast an imputation upon the credit and stability of the bank, must equally constitute some evidence of express malice, for the reasons already given that they knew there was no ground for any such imputation, and therefore must have been actuated by improper motives if they intended it. I arrive then at the conclusion that the appeal ought to be dismissed, but I do so with the doubts which I have already expressed.

COTTON, L.J. We have to consider whether the case ought again to go to a jury, or whether we ought to give judgment for the defendants. In my opinion the defendants are entitled to our judgment. Two questions arise, first, whether the circular is a libel, that is to say, whether there is in it a defamatory statement prejudicial to the plaintiffs, and if so, secondly, whether it was written on an occasion which was privileged, and, if so, whether there was any evidence to go to the jury that there was express malice, or malice in fact on the part of the defendants. The circular is a simple and very short statement made to the customers of the defendants of the determination at which they had arrived not to take cheques on any of the branches of the Capital and Counties Bank. It states nothing else. No statement defamatory of the plaintiffs or to the prejudice of their credit is in terms made by the circular, and therefore one must consider, not what the words are, but what conclusion could reasonably be drawn from it, as a man who issues such a document is answerable not only for the terms of it but also for the conclusion and meaning which persons will reasonably draw from and put upon the document. But if there is not in the document itself that which on the fair interpretation of the language is defamatory, the special circumstances must be regarded, and those circumstances may shew that it is defamatory and was intended so to be, or that it was not defamatory. I will put an example in contrast with the circumstances of the present case. Here the defendants could, without being liable in an action, have refused to take cheques drawn on either the branches or the chief office of the bank. But if they stuck up on the walls of any of the towns where the bank had a branch office, or, say, in Chichester, an

advertisement to this effect, viz.: "We hereby give notice that we will not take any cheques of the Capital and Counties Bank," they would have no possible reason for so doing except for the purpose of casting an imputation on the bank, as that notice would be given, not to persons with whom they were dealing and from whom they might expect to receive cheques on this bank, but would be an announcement to every member of the public, and to members of the public with whom they stood in no business relation, and to whom they could have no reason for making such a communication unless they intended to say something depreciatory of the bank; and then it might be a reasonable conclusion that although the notice contained nothing in terms defamatory, yet that the intention was to intimate that the defendants did not trust the bank's solvency, and therefore the notice was a libel. But what are the circumstances? The circulars were sent for a purpose. They were sent to those persons with whom the defendants were dealing for the purpose of intimating a determination at which the defendants had arrived and had a right to arrive. That being so, is it reasonable to construe the document as casting some imputation on the bank? The only suggestion is that the circular does not state the reason which induced the defendants to send it round. Is it reasonable that those who receive it and know they are dealing with the defendants, and therefore that the communication may reasonably be made to them, should suggest that the construction of the document is that the bank is not to be trusted? That is to say, to take that to be the meaning of the document and the reason, shewn by the document to be the reason, which induced the defendants to make the statement. When the special circumstances of the persons to whom it was sent—not of those to whom they might communicate it—are known, in my opinion it would not be reasonable to hold that there was anything defamatory in the statement, or to treat it as anything but as an absolute communication of a determination at which the defendants had arrived. This being so, if the case was to be decided on that question alone, I should say that on the facts before the jury there was no evidence on which they could reasonably come to the conclusion that this was a libel. But the case does not stand there alone. The circular was sent on an occasion

1880

CAPITAL AND COUNTIES BANK v. HENTY.

Cotton, L.J.

which was privileged, that is to say, the defendants, having arrived at the conclusion not to take the cheques on the branches of the bank, had a duty cast upon them to communicate that fact to their customers, who might otherwise send their cheques, which the defendants might have refused to receive in payment, and of course the defendants, if they desired to save themselves trouble, had also an interest in communicating their determination and their customers an interest in knowing it.

Then what evidence was there to justify the jury in finding a verdict against the defendants? When a defamatory statement is made on a privileged occasion there must, in order to render the statement libellous, be evidence of express malice; that is to say, of an intention on the part of the defendant to do something other than merely to perform a duty, or to make the communication in the interests of the person who makes and the person who receives it. There was, in my opinion, no evidence to justify such a conclusion. We must look not only at one particular circumstance in the case, but also at the conduct of the defendants. Possibly their determination not to take any of these cheques was arrived at under a feeling of irritation, but having arrived at that determination, which subjects them to no liability in an action, they communicated it to their customers, and in my opinion they were undoubtedly entitled to communicate it. So that the document was under those circumstances a privileged document. But the complaint is that the defendants did not, as if cautious they ought to have done, state the reason which induced them to send the circulars round, so as to exclude the possibility of somebody suggesting, or arriving at the conclusion that it was issued because the defendants did not trust the bank. Mere stupidity or carelessness is not of itself malice, but no doubt there may be carelessness or recklessness of such a kind as may be evidence of malice. But here there is not, in my opinion, having regard to the circumstances, any such recklessness or other act on the part of the defendants as would justify the jury in finding that there was malice in fact. They sent the circular only to their customers, excluding those who were at Brighton, and they sent it not only to those customers from whom they got cheques on the bank, but generally to their customers who had to make payments either

periodically or at certain times to the defendants' traveller, who went round to receive money due to them. I am satisfied that there was no intention on the part of the defendants in sending the circular to cast any imputation at all on the plaintiffs, and that the facts of the case do not, and would not, justify a jury in arriving at the conclusion that in fact the defendants had any other intention than to send and to communicate to their customers the conclusion at which they had arrived, and had a right to arrive; and, therefore, on that second ground also, which is independent of the first, I am of opinion that the jury would not be justified in finding a verdict against the defendants. In my opinion, therefore, the defendants are entitled to our judgment.

BRETT, L.J. My view of the law in this matter is this. Since it has been determined (and Mr. Fox's Act was only declaratory of the common law) that an alleged libel must go to the jury, the first question for the jury is whether the document would be read in a defamatory sense by persons of ordinary reason in the position of those to whom it is published. If, in the opinion of the jury, it would not be so read according to the primâ facie meaning of the language, then there is a further question (if there is any evidence upon which it can be raised) whether there were facts known both to the person who framed the alleged libel, and to the persons to whom it was published, which would lead the latter reasonably to put upon the document the construction that, having a secondary defamatory sense, it was issued ironically or otherwise than in the primary sense of the language. With regard to the second proposition, I think it is necessary that the facts should be known both to the person who indites the libel and to the persons to whom it is published, because if facts are known to the latter persons from which they might reasonably suppose that the document is defamatory, but those facts are not known to the person who wrote it, if he were held liable he would be made liable for doing that which by the hypothesis he could have no reason to suppose would injure anybody, the language used being such as in its ordinary sense would not be defamatory of anybody. Again, if there are facts known to the person who writes the libel, which, if known to the persons who receive it, might reasonably lead

1880

CAPITAL AND COUNTIES BANK v. HENTY.

Brett, L.J.

them to suppose that it was used in an ironical sense, yet, if those facts are not known to the persons who receive it, that which is written, although written inadvertently or maliciously, could produce no effect upon their minds. Though the act might be negligent or wrongful on the part of the person writing the libel, the person who received it would, by the hypothesis, have no reasonable ground for reading it in any evil sense. I say, therefore, that when you come to consider the question whether or not the document is a libel by reason of the language having a secondary, as distinct from its primary sense, there must be evidence of facts which would reasonably make it defamatory in its secondary sense known both to the person who wrote the document and to the persons to whom it was published.

Applying this view to the present case, the first question is whether that which the defendants wrote could reasonably be taken by those who received it (for they were the only persons to whom it was published) in any defamatory sense. This is not the case put in argument where a document is published by putting it on the walls. There it is published to all the world. Persons might possibly there be justified in saying that the reasonable conclusion to come to, where a statement that cheques of a bank will not be received is published on the walls of a town, is that the person who published it doubted the stability of the bank. Here the persons to whom the document was published were not the general public, but people who had knowledge of the particular facts. They had been in the habit of cashing cheques drawn by their customers upon the branches of this bank, and they had been in the habit of receiving payment from their customers by those cheques, and of forwarding those cheques to the defendants in payment of their accounts. That was a mode of payment which the defendants in the ordinary course of business were not bound to accept. It was a course of business which we should almost think, in the majority of cases, persons in the position of the defendants would not accept. If those cheques were only to be honoured at the district on which they were drawn, it was the most inconvenient mode for their customers to pay the defendants in that could well be conceived, because the defendants would have to send back those cheques to the places where they were to

1880

CAPITAL AND COUNTIES BANK v. HENTY.

Brett, L.J.

be cashed. The only thing which, in a business point of view would make it likely that the defendants would continue to receive payment of their accounts by such cheques, would be that they could cash those cheques at the place where they themselves were carrying on business. That being so, the defendants were entitled to refuse any longer to receive payment in that form for many reasons. First of all, because it was no longer convenient to them; but, secondly and mainly, because they did not choose to do it. They were entitled to refuse such mode of payment, not only legally but as a matter of pure business. They were entitled to refuse such cheques from such customers for such payments merely because they no longer pleased to receive them. If they did no longer so please they could not intimate that to their customers except by writing and telling them so. An observation was made on the fact of the defendants having communicated this by means of a printed circular, but that was in a moment explained by shewing that they had so many customers of that kind that to have ordered their clerks to write it would not have been a reasonable way. So that the mode of sending out the circular at all events, was not an unreasonable one. Therefore, by this document, the defendants were doing, as my Brother Cotton has said, an act which they were entitled to do, and without any sinister motive whatever. They write in language which is only sufficient to intimate their intention and will, and those who receive the intimation are surely bound as reasonable men to know that the defendants have the right, at their own pleasure, to do so. It seems to me unreasonable that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document. Therefore I am of opinion that this document could not reasonably be taken in a defamatory sense by those to whom it was published according to the primary meaning of the language used in it. But it is said it might be taken to be defamatory in a secondary sense in consequence of certain facts. The facts relied on are that the defendants might be and were angry, because the manager of the bank at Chichester ceased to give them the assistance and facility which the bank at Chichester had formerly given by cashing their cheques drawn upon branches of the bank, and that the

1880

CAPITAL AND COUNTIES BANK v. HENTY.

Brett, L.J.

defendants wrote the circular in consequence of that anger. But those facts were not known to the persons to whom the circular was sent, and if I am right in my view of the law that the facts must be known to both sides, there is no evidence of facts known to both sides by which a secondary defamatory meaning could be put upon the document. If so, there was, therefore, no evidence that this was a defamatory document, either in a primary or a secondary sense.

If that be so the question of privileged occasion and of malice does not arise. But supposing I am wrong with regard to the first question, and that it be true to say that this document in its primary sense to the person to whom it was published might reasonably convey a defamatory meaning, if that is so I entirely agree with Lord Coleridge that the occasion was privileged. If the occasion was privileged and the document was a libel, then, although it was a libel, nevertheless the defendants are not liable unless they misused the privileged occasion and unless the reason why they misused it was that they were actuated by malice in fact. In my judgment, it is not enough to shew that the defendants were actuated by malice in fact, you must shew that by reason of malice in fact they misused the privileged occasion. What is there then—if this circular be taken as a libel because in its primary sense it might convey to those who received it a defamatory meaning — to shew that the defendants were actuated by malice in fact which caused them to misuse the occasion. It seems to me that in this particular case the only way in which a case of malice, shewing proof of a misuse of the occasion, could be made out would be by satisfying the jury that the defendants intended to convey an imputation upon the bank's credit. If they did not, unless the jury were persuaded that the defendants were through anger acting with such recklessness as not to care whether they injured the bank or not, there is no evidence of malice in fact. It has not, except in the extremity of argument, been urged that anybody could reasonably believe that the defendants intended to lead the persons to whom the circular was sent to believe that the bank was incapable of meeting its engagements. From what could a jury draw such an inference? The defendants did not put the circular on the walls; they sent

it to the people to whom it was necessary that they should express their intention. There were other customers of theirs in a place where the difficulty did not arise, and to them they did not send the circular. In my opinion it would have been wholly unreasonable for any jury to find that the defendants intended to impute that the bank was incapable of meeting its liabilities, and I can see no evidence of such rashness or recklessness as would shew that they were careless whether they injured the bank or not. It has been suggested by my Brother Thesiger that it was imprudent on the defendants' part not to state the reason of their refusal to take the cheques. With great deference I should be wholly dissatisfied with a verdict saying that a mere omission to give the reason, where no reason is necessary, was evidence upon which a jury might found so formidable a conclusion as that the defendants maliciously and wickedly intended to injure the bank. I am of opinion that no persons in the position of those who received this document could reasonably come to the conclusion that it ought to be taken in a defamatory sense; that there were no facts known to them which would justify them in giving it any secondary defamatory sense, and I am of opinion further that, if there was some evidence that the document was defamatory according to the primâ facie meaning of the language, there was no evidence of malice in fact to shew that the defendants had abused the privileged occasion.

What we have had to say in this case is whether there was any evidence to go to the jury. It is not for the judge to determine the sense of the document, but it is for him to say whether it could reasonably bear an improper signification. That is a part and a very difficult part of the duty of a judge, and the form in which one has to state one's conclusion is this.

Judgment reversed.

Solicitors for plaintiffs: *Nash & Field.*

Solicitors for defendants: *Robinson, Preston, & Stow.*

1880
June 9.

COLLINS AND OTHERS, PETITIONERS; PRICE, RESPONDENT.

TEWKESBURY ELECTION PETITION.

Parliament — Election Petition — Changing Place of Trial — Parliamentary Elections Act, 1868 (31 & 32 *Vict. c.* 125), *s.* 11, *subs.* 11.

Something more than mere inconvenience must be shewn, to induce the Court to change the place for the trial of an election petition from the county or borough where the election has taken place.

The order for that purpose must be made by the Court, and not by a judge at chambers.

THE petitioners in this case sought to unseat the respondent, for bribery, treating, and undue influence by agents before, during, and after the election.

A. L. Smith (both parties concurring,) moved that the place of trial of this petition might be changed from Tewkesbury to Gloucester. (1) The application was based upon an affidavit by the returning officer, who stated "That it would be difficult if not impossible for him to provide a place suitable for the above trial, the only building at the disposal of the corporation being the town-hall, which was incomplete in space and convenience for the proper accommodation of the judges and their officers, counsel, and others engaged in the matter of the petition, and altogether unsuitable for the purpose: That it was impossible to provide proper accommodation for the judges and their attendants at Tewkesbury; there being no private house available for the purpose, and the hotel accommodation being totally insufficient: That, in the event of the trial taking place at Tewkesbury, it would be necessary to provide suitable accommodation for the

(1) Sect. 11, subs. 11, of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), enacts that "the trial of an election petition, in the case of a petition relating to a borough election, shall take place in the borough, and, in the case of a petition relating to a county election, in the county: Provided always that, if it shall appear to the Court that special circumstances exist which render it desirable that the petition should be tried elsewhere than in the borough or county, it shall be lawful for the Court to appoint such other place for the trial as shall appear most convenient: Provided also that, in the case of a petition relating to any of the boroughs within the metropolitan district, the petition may be heard at such place within the district as the Court may appoint."

judges and their attendants at Cheltenham, a distance of nine miles from Tewkesbury, or at Gloucester, a distance of eleven miles from Tewkesbury; and such a course would necessitate the travelling of the judges to and from one of those places daily, and also involve them in extra exertion, and occasion considerable increased expense: And that there were suitable Courts and judges' lodgings in the city of Gloucester which would be available for the purposes of the trial; and it was in his opinion desirable for the above reasons that the place of trial should be changed from Tewkesbury to Gloucester."

The application had previously been made to Lush, J., at chambers, and that learned judge made an order that the trial should take place at Gloucester. A doubt, however, arose as to whether such an order could be made by a judge at chambers.

LORD COLERIDGE, C.J. I think orders of this sort must be made by the Court, and not by a judge at chambers. But I should expect circumstances very special to be shewn,—more so than a mere balance of convenience,—before I depart from what I conceive to be the clear intention of the Act, that the petition should be heard in the borough or county where the election took place. I am, however, unwilling to differ from the opinion expressed by my Brother Lush.

GROVE, J. I participate in the doubt suggested by my Lord as to the sufficiency of the affidavit of the mayor. The words of the Act would seem rather to point to some strong local political feeling, or some apprehended riot, or the like. Tewkesbury is a goodly town, though there may be better accommodation elsewhere. Still I do not differ from the opinion of my Brother Lush.

LORD COLERIDGE, C.J. I simply wish it to be understood that I yield to the opinion expressed by my Brother Lush.

Order absolute.

Agents for petitioners: *C. C. Ellis & Co.*
Agents for respondent: *Wyatt, Hoskins, & Co.*

1880
June 9.

WELLS, PETITIONER; WREN, RESPONDENT.

WALLINGFORD ELECTION PETITION.

Parliament—Election Petition—Interrogatories—Parliamentary Elections Act, 1868 (31 *&* 32 *Vict. c.* 125), *ss.* 2 *and* 26—*Rule* 44 *of the rules of Michaelmas Term,* 1868.

Neither the Court nor a judge at chambers has power to allow interrogatories to be administered to a sitting member, under ss. 2 and 26 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125) or the 44th rule of Michaelmas Term, 1868.

Semble (per Lord Coleridge, C.J., and Grove, J.), that the power given to the election judges on the rota by s. 25 of the Parliamentary Elections Act, 1868, does not enable them to make a rule for exhibiting interrogatories.

THE petitioner in this case applied by summons to Lindley, J., at chambers, for leave to administer interrogatories to the respondent. The learned judge refused the application, with costs, conceiving that he had no power to grant it: and he indorsed on the summons the following note:—

"I think that, upon the true construction of ss. 2 and 26 of the Act of 1868, I have no power to make this order, although the election judges can, by making a rule under s. 25, authorize interrogatories to be delivered: as yet, however, there is no such rule."

Pollard, moved by way of appeal. The question turns upon ss. 2 and 26 of the Parliamentary Elections Act, 1868, and the 44th of the rules of Michaelmas Term, 1868, made under the authority of that Act. Sect. 2 enacts that "the expression 'the Court' shall, for the purposes of this Act, in its application to England, mean the Court of Common Pleas at Westminster, and, in its application to Ireland, the Court of Common Pleas at Dublin; and such Court shall, subject to the provisions of this Act, have the same powers, jurisdiction, and authority with reference to an election petition and the proceedings thereon, as it would have if such petition were an ordinary cause within their jurisdiction." That section gives to the Court, in reference to

these petitions and the proceedings thereon, the same powers that it has in ordinary causes. Then comes s. 26, which enacts that, "Until rules of Court have been made in pursuance of this Act, and so far as such rules do not extend, the principles, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions shall be observed, so far as may be, by the Court and judge in the case of election petitions under this Act." Amongst the rules made by the judges under s. 25 of the Act is rule 44 of Michaelmas Term, 1868, which provides that "All interlocutory questions and matters, except as to the sufficiency of the security, shall be heard and disposed of before a judge, who shall have the same control over the proceedings under the Parliamentary Elections Act, 1868, as a judge at chambers in the ordinary proceedings of the superior Courts; and such questions and matters shall be heard and disposed of by one of the judges upon the rota, if practicable, and, if not, then by any judge at chambers." This is an interlocutory matter which a judge at chambers, in the ordinary proceedings of the Court, has power to hear and dispose of. The case is not without precedent. Hannen, J., in the case of the *Staleybridge Petition* (1), made an order for the examination upon interrogatories of a witness who was in danger of immediate death. In opposition to the application it was there contended, upon the authority of the *Ipswich Case* (2), that, inasmuch as election committees had never exercised the power of examining witnesses other than vivâ voce, there was no power under the Act of 1868 (which transferred to this Court the jurisdiction of the committees) to order an examination upon interrogatories. The learned judge, however, thought that, inasmuch as the taking of evidence was a "proceeding" on the petition, he had such power. A similar course was taken by Blackburn, J., who made an order for discovery of telegraphic despatches in the case of the *Coventry Petition*. (3) And this was followed by the same learned judge, who made an order for inspection of documents in the case of the *Stafford Petition*. (4)

(1) 19 L. T. 703.
(2) B. & Aust. 261.
(3) 19 L. T. 742.
(4) 20 L. T. 237.

1880

WELLS v. WREN.

[LORD COLERIDGE, C.J. Upon neither of those occasions was s. 26 referred to. That seems to me to be a special clause by which Parliament has expressly limited the jurisdiction of the Court. The enactment in s. 2 is "subject to the provisions of this Act," one of which provisions is s. 26; and that section enacts that, until rules are made under s. 25, and so far as when made they do not extend, the principles, practice, and rules observed by election committees shall be observed by the Court and judge. The exhibiting of interrogatories to a sitting member was a thing altogether unheard of in parliamentary practice. The *Ipswich Case* (1) occurred in 1842. It does not warrant the argument sought to be deduced from it. Sir Thomas Cochrane, who had been served with a Speaker's warrant to produce certain letters and documents before an election committee, being about to leave the country, it was moved "that Sir Thomas Cochrane do stand at the Bar of this House," for the purpose of being examined vivâ voce. And, after arguments had been heard against and in support of the motion, it was withdrawn: see Hansard's Debates, vol. 60, pp. 884–898. The practice of election committees was governed by Grenville's Act, 10 Geo. 3, c. 16 (and not by Peel's Act of 1848, 11 & 12 Vict. c. 98), until their jurisdiction was transferred to us by the Act of 1868: see May's Parliamentary Practice, 7th ed. 641.]

In the case of the *Bewdley Petition* (2) recently, an order for interrogatories was made by Lush, J.

[LORD COLERIDGE, C.J., was his attention called to s. 26?

A. L. Smith, Amicus Curiæ, stated that it was not, and that in 1874 orders for interrogatories were obtained in two cases, from Bramwell, B., and Mellor, J.

LORD COLERIDGE, C.J. The object of the Act of 1868 was, to make over to this Court the powers of the election committees, and to diminish the expense by trying these matters in the county or borough where the election took place.]

Rule 44 will be inoperative altogether unless the effect contended for be given to it.

[LORD COLERIDGE, C.J. That rule cannot enlarge any juris-

(1) B. & Aust. 261. (2) Not reported.

diction which the judges have under the Act, or give them any new powers: nor does it in terms embrace this matter. I incline to question the latter part of my Brother Lindley's indorsement. I doubt whether the election judges could make such a rule.

GROVE, J. I participate in that doubt.]

Moulton, for the respondent, was not called upon.

LORD COLERIDGE, C.J. I think the decision of my Brother Lindley was perfectly correct. The question is one which we are called upon to determine for the first time after argument. It turns upon the 2nd and 26th sections of the Parliamentary Elections Act, 1868, and rule 44 of the rules made by the judges under the provisions of that Act. Sect. 2 enacts that "the Court" (and the judges also, I presume) "shall, *subject to the provisions of this Act*, have the same powers, jurisdiction, and authority with reference to an election petition and the proceedings thereon as it would have had if such petition were an ordinary cause within their jurisdiction." If the words "subject to the provisions of this Act" had not been there, the powers conferred by that section would have been confined to "the Court." Now, one of the "provisions" referred to is s. 25, "The judges for the time being on the rota for the trial of election petitions in England and Ireland may respectively from time to time make, and may from time to time revoke and alter, general rules and orders (in this Act referred to as the rules of the Court) for the effectual execution of this Act, and of the intention and object thereof, and the regulation of the practice, procedure, and costs of election petitions, and the trial thereof, and the certifying and reporting thereon." It then goes on to provide that any general rules and orders so made shall be of the same force as if they were enacted in the body of the Act, and that they shall be laid before parliament. No doubt the rules and orders made in pursuance of the authority so given were duly laid before parliament. Then s. 26 of the Act says that, "until rules of Court have been made in pursuance of this Act, and so far as such rules do not extend, the principles, practice, and rules on which committees of the House of Commons have heretofore acted

1880

WELLS v. WREN.

Lord Coleridge, C.J.

in dealing with election petitions shall be observed so far as may be by the Court and judge in the case of election petitions under this Act." Now, the judges could not enlarge their jurisdiction: they were impowered to make rules to execute, not to extend, the Act. Again, s. 29 says that, on the trial of an election petition under this Act, the judge shall, subject to the provisions of this Act, have the same powers, jurisdiction, and authority as a judge of one of the superior Courts and as a judge of assize and nisi prius; and the Court held by him shall be a court of record;" that includes, amongst others, the power of committal for contempt, to order witnesses to answer, to issue a commission for the examination of a witness, and the like. Then the 44th of the General Rules of Michaelmas Term, 1868, provides that "all interlocutory questions and matters, except as to the sufficiency of security, shall be heard and disposed of before a judge, who shall have the same control over the proceedings under the Parliamentary Elections Act, 1868, as a judge at chambers in the ordinary proceedings of the superior Courts; and such questions and matters shall be heard and disposed of by one of the judges upon the rota, if practicable, and, if not, then by any judge at chambers." No doubt that is a rule which it was within the authority of the judges to make. Now it is said that, under s. 2 of the Act, a judge at chambers, to whom is not given all the powers of the Court, can do what the Court can do; and that one of the powers conferred thereby is the power to order interrogatories to be administered. I find no section in the Act which gives a judge at chambers *all* the powers of the Court: and, interpreting s. 26, which is "one of the provisions of the Act," according to common sense, I hold that, so far as the provisions of the Act and of the rules made under s. 25, do not extend, the principles, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions shall be observed, so far as may be by the Court and judge in the case of election petitions under this Act. It is admitted that the exhibition of interrogatories to the sitting member by an election committee was a thing unheard of.

I should be content to rest my judgment on that short ground.

But I go further; and, having some recollection of the numerous petitions which I have conducted before election committees, it seems to me to be manifestly contrary to the principles which regulated the proceedings before those tribunals to administer interrogatories to the sitting member. The information desired might be obtained in another way, without violating those principles. The sitting member might always be called and asked questions. He might, it is true, refuse to answer; and the committee might draw their own conclusions: so may the judge. Under another Act, 26 & 27 Vict. c. 29, s. 7, witnesses are compelled to answer, and, if they answer truly, are protected from the consequences. But that is not the question now before us.

Upon principle as well as upon the authority of the Act, I am of opinion that there is no warrant for this application, and that the order of my Brother Lindley was quite correct.

GROVE, J. I am of the same opinion. The first question is whether a judge at chambers may act in a matter of this sort. I think the word "Court" in the first part of s. 2 of the Parliamentary Elections Act, 1868, applies only to the Court, and not to a judge at chambers. As to the second point, I am of opinion that s. 26 puts it beyond all doubt,—"Until rules of Court have been made (under s. 25), and so far as such rules do not extend, the principles, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions shall be observed so far as may be by the Court and judge in the case of election petitions under this Act." It is admitted that the administering of interrogatories was not within "the principles, practice, and rules" upon which election committees heretofore acted; and I conceive that it is not within any principle, practice, or rule which is fairly analogous. I am far from saying that my Brother Hannen was not right in making the order he did in the *Staleybridge Case*. (1) The election committees had such power. The decision of my Brother Lush in the *Bewdley Case* (2) is the only one which really conflicts with

(1) 19 L. T. 703. (2) Not reported.

1880

WELLS v. WREN.

Grove, J.

what we are about to do. It appears, however, that s. 26 of the Parliamentary Elections Act, 1868, was not called to his attention upon that occasion. That being so (for, one cannot carry in one's mind all the provisions of an Act of Parliament), this point may be said not to have been before him. As to rule 44, that cannot by its words or by any reasonable construction enlarge the power of the Court or judge: it only says that "all interlocutory questions and matters, except as to the sufficiency of the security, shall be heard and disposed of before a judge, who shall have the same control over the proceedings under the Parliamentary Elections Act, 1868, as a judge at chambers in the ordinary proceedings of the superior Courts." That applies only to matters which properly arise and are within the jurisdiction of the judges sitting at chambers. The administering of interrogatories is wholly inapplicable to a proceeding of this sort. The petition against the return of a member of Parliament is a proceeding of a public character; and it would be a strong thing to apply to it a practice which is not in accordance with the ordinary principles of English law. It is enough, however, to say that it is not within the Act. I think my Brother Lindley was quite right in declining to make the order prayed.

Appeal dismissed.

Agents for petitioner: *Duignan & Smiles.*
Agents for respondent: *Sharpe, Parkers, & Co.*

JOHNSON AND ANOTHER, PETITIONERS; RANKIN, RESPONDENT. 1880
LEOMINSTER ELECTION PETITION. *June* 26.

SAUL ISAAC AND ANOTHER, PETITIONERS; SEELEY, RESPONDENT.
NOTTINGHAM ELECTION PETITION.

Parliamentary Elections—Withdrawal of Petition—Parliamentary Election Act, 1868 (31 & 32 *Vict. c.* 125), *s.* 36—*Form of Affidavit.*

In the affidavits used upon an application under s. 36 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), for leave to withdraw a petition against the return of a member, it is not enough for the petitioner and respondent to swear that, "to the best of their knowledge, information, and belief, the withdrawal of or application to withdraw the petition is not the result of any corrupt arrangement, or in consideration of the withdrawal of or application to withdraw any other petition." They must make a positive affidavit that they have not been parties to any corrupt arrangement and deny to the best of their knowledge, information, and belief, that any such arrangement has been made by their agents. The existence of any such arrangement must also be denied by the agents themselves.

Goodman, for the petitioner in the first of these cases, moved for leave to withdraw the petition, on the ground that the petitioner had since filing the petition been advised that there was not sufficient evidence to sustain the charges therein made against the sitting member. The affidavits of the petitioners and the respondent in support of the application, following the forms given in Leigh & Le Marchant, 2nd ed. 168, and in Hardcastle, 1st ed. 32, stated that, "to the best of my knowledge, information, and belief, the withdrawal of or application to withdraw this petition is not the result of any corrupt arrangement, or in consideration of the withdrawal of or application to withdraw any other petition."

Anstie, for the respondent, appeared to consent.

LORD COLERIDGE, C.J. An affidavit in this form, "to the best of my knowledge, information, and belief," is far too loose. These applications must be carefully watched, inasmuch as the Court is, by s. 36 of the Parliamentary Elections Act, 1868, to report to the Speaker whether in its opinion the withdrawal of the petition was the result of any corrupt arrangement, or in consideration of the

1880

JOHNSON v. RANKIN.

ISAAC v. SEELEY.

withdrawal of any other petition; and, if so, the circumstances attending the withdrawal." Parliament has intrusted to this Court an important jurisdiction; and they must be satisfied of the fact, and must exhaust all the means at their disposal in order to be tolerably sure that they are reporting the truth. The petitioner and respondent should make a positive affidavit pledging their oaths that they have not been parties to any corrupt arrangement, and should also go on to negative any such arrangement by their agents to the best of their knowledge, information, and belief. The agents also should negative the fact; for, there may be arrangements entered into between the agents, of which the petitioner and the respondent are purposely kept in ignorance. Upon production of affidavits amended in these respects before my Brother Grove and myself at Guildhall on Saturday morning next (it being uncertain when this Court will sit here again), the rule may go.

GROVE, J. It is quite consistent with these affidavits that the parties have made no inquiry whatever of their agents about the matter.

Motion adjourned.

Hannen, for the petitioner in the Nottingham Election Petition, made a similar application upon similar affidavits, and with the like result.

Motion adjourned.

Applications were also made for leave to withdraw the Bury St. Edmunds, Horsham, and Wilton petitions, upon similar materials. These were likewise adjourned for the production of amended affidavits. The form ultimately approved of was as follows:—

"To the best of my knowledge, information, and belief, from inquiry I have made of all my agents, and speaking positively for myself, the application to withdraw the said petition is not the result of any corrupt arrangement between me or my said agents and the said petitioners [or respondents], or either of them, or in consideration of the withdrawal of any other petition."

The agent's affidavit deposed positively as to himself, and "to the best of his knowledge, information, and belief" as to the other members of his firm.

Orders absolute, on payment of costs.

Agents for the respective parties,—

Leominster petition, for petitioners: *Hunt & Son.*
for respondent: *F. J. Hand.*

Nottingham petition, for petitioners: *Villars, Smith, & Co.*
for respondent: *Field, Roscoe, & Co.*

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

In the First Series,
1 Ch. D.

In the Second Series,
1 Q. B. D. 1 Ex. D.
1 C. P. D. 1 P. D.

In the Third Series,
1 App. Cas.

INDEX.

AMENDMENT—List of voters—Misdescription *See* PARLIAMENT. 7. [65

—— Notice of objection - - - 225 *See* PARLIAMENT. 3.

APPEAL—County court judge's note - 139 *See* COUNTY COURT.

AUCTIONEER—Misrepresentation—Right of way - - - - 376 *See* WAY, RIGHT OF.

BANKER—*Crossed Cheques Act*, 1876 (39 & 40 *Vict. c.* 81), *s.* 12.] Sect. 12 of the Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81), exonerates a banker from all liability to the true owner of a cheque crossed in blank,—that is, with the words "and company" or an abbreviation thereof between two parallel transverse lines, or two parallel transverse lines simply, but without the words "not negotiable,"—where the banker has bonâ fide, in the usual course of business, and without negligence, received payment of it for a customer, notwithstanding any defect in the title of the latter, whether by reason of a forgery of the indorsement or otherwise. MATTHIESSEN *v.* LONDON AND COUNTY BANK 7

BANKRUPTCY—*Act of Bankruptcy—Notice of Petition—Execution Creditor—Protected Transaction*—32 & 33 *Vict. c.* 71, *s.* 95, *sub-s.* 3.] Where goods have been seised under a fi. fa., a notice to the execution creditor which states that a petition in bankruptcy against the execution debtor has been filed on a date, at a Court, and by a person named in the notice, is sufficient notice of an act of bankruptcy to prevent the execution being a protected transaction within 32 & 33 Vict. c. 71. s. 95, sub-s. 3, if bankruptcy should follow and the title of the trustee relate back to an act of bankruptcy prior to the seizure; because such petition must necessarily be founded on an act of bankruptcy. LUCAS *v.* DICKER - - - 150

2. —— *Composition—Debt—Bills given—Dishonoured—Statement of Amount—Original Cause of Action*—32 & 33 *Vict. c.* 71, *s.* 126.] Being indebted to the plaintiff for goods sold to the amount of 143*l.* 12*s.* 9*d.*, the defendants gave him bills for the sum, less discount, but adding interest, so that the amount of the bills was 142*l.* 7*s.* 3*d.* These bills were dishonoured. The defendants compounded with their creditors under s. 126 of the Bankruptcy Act, 1869, and, in the statement of debts, entered the amount of the debt due to the plaintiff, a non-assenting creditor, as 142*l.* 7*s.* 3*d.*, viz., the amount of the bills. The plaintiff sued for 143*l.* 12*s.* 9*d.*, the original debt. The defendants pleaded the composition:—*Held*, by Lopes, J., that the original cause of action was suspended but not satisfied by the bills, and revived when they were dishonoured; that, therefore, at the date of the composition, the amount of the debt due to the plaintiff was 143*l.* 12*s.* 9*d.*, and, as it was not correctly shewn in the statement, the composition was no bar to his action. BURLINER *v.* ROYLE [354

BILL OF EXCHANGE—Acceptance by partner in private name - - - 109 *See* PARTNERSHIP.

BILL OF SALE—*Assignment of Future-acquired Property—Stock-in-Trade, Substitution of.*] By bill of sale the grantor assigned to the grantee the stock-in-trade then in certain specified premises, and also the stock-in-trade which should or might at any time during the continuance of the security be brought into the premises, either in addition to or in substitution for stock-in-trade therein at the date of the bill of sale:—*Held*, by Lopes, J., that the assignment was sufficient to pass the property in stock-in-trade afterwards brought into the premises in addition to or in substitution for that previously there. LAZARUS *v.* ANDRADE - - - - - 318

2. —— *Want of Attestation—Void as between Grantor and Grantee*—41 & 42 *Vict. c.* 31, *ss.* 8, 10.] A bill of sale to which the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), applies, must be explained to the grantor and attested by a solicitor in compliance with the provisions of ss. 8, 10, or otherwise it will be void even as between the grantor and grantee. [Overruled in Court of

BILL OF SALE—*continued.*

Appeal, vide p. 128 and next case]. Davis *v.* Goodman - - - - - 20

3. —— *Attestation by Solicitor—Void as between Grantor and Grantee—41 & 42 Vict. c. 31.*] A bill of sale to which the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), applies, if it be not explained to the grantor and attested by a solicitor in compliance with ss. 8 and 10, is not void as between the grantor and grantee:—So *held*, overruling the judgment of the Common Pleas Division. Davis *v.* Goodman - - C. A. 128

4. —— *By Equitable Owner—Prior Unregistered Bill of Sale—Grantor out of Possession—41 & 42 Vict. c. 31, s. 4—Practice—Appeal from County Court—Grounds of Judgment.*] Goods were vested in a trustee with power to sell them upon the direction of his cestui que trust. The cestui que trust, with the authority of the trustee, executed and registered a bill of sale assigning the goods:—*Held*, that the bill of sale was void as against execution creditors.—A judgment of the county court may, upon appeal, be upheld on other grounds than those on which the county court judge proceeded, if they appear and are admitted in his notes.—A county court judge decided that a registered bill of sale, given by a person out of possession of the goods assigned and deriving title from a grantee under an unregistered bill of sale, was invalid against an execution creditor.—*Held*, by Grove, J. (Lopes, J. dissenting), that this decision was correct. Chapman *v.* Knight - - - - - 308

5. —— *Consolidation of Mortgage with—Execution Creditor—Right to Surplus Proceeds of Goods after discharging Bill of Sale.*] The doctrine of consolidation of mortgages does not enable the grantee by a registered bill of sale of goods seized under a fi. fa. to tack a prior mortgage of other property of the grantor, and claim that the surplus proceeds of the goods, after discharging the sum secured by the bill of sale, shall be applied in satisfaction of the prior mortgage, so as to defeat the right of the execution creditor to such surplus. Chesworth *v.* Hunt - 266

6. —— *Registration of—Affidavit—Description of Occupation of Grantor—Past Occupation—17 & 18 Vict. c. 36, s. 1.*] The affidavit filed with a registered bill of sale stated that the grantor "was until lately" a commercial traveller. It appeared that the grantor was a commercial traveller at the date of the execution of the bill of sale:—*Held*, that the description of his occupation was insufficent to satisfy the provisions of 17 & 18 Vict. c. 36, s. 1. Castle *v.* Downton - - 56

7. —— *Statement of Consideration—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8.*] The consideration for a bill of sale was stated to be "the sum of 182*l.* 3*s.* now paid by the grantee to the grantor." That sum was, at the request and with the assent of the grantor, in fact paid thus, 8*l.* 3*s.* 3*d.* and 103*l.* 17*s.* 5*d.* to discharge two executions against the grantor's goods,—25*l.* 0*s.* 9*d.* to a solicitor (who attested the execution of the bill of sale) for money lent and for costs due to him from the grantor,—and the balance 45*l.* 1*s.* 7*d.*, in cash to the grantor:—*Held*, in the absence of any suggestion of fraud, a sufficient setting forth of the consideration, within 41 & 42 Vict. c. 31, s. 8. Hamlyn *v.* Betteley - - 327

8. —— *Stock in Trade—Implied Licence to dispose of Goods—Licence to deal with them in the ordinary course of Business—Fraudulent Sale.*] B., a trader, assigned to the plaintiff his stock-in-trade by a bill of sale with a proviso that until default in payment of the money advanced B. should be entitled to make use of such stock without hindrance or disturbance on the part of the grantee. B. afterwards sold the goods to the defendants by private contract, and absconded. The jury found that B. sold the goods fraudulently, and not in the ordinary course of his business; but the defendants did not know this, and bought the goods bonâ fide:—*Held*, that, upon this finding, the verdict was properly entered for the plaintiff: the right of the grantor to deal with the goods being subject to the implied condition that the dealing should be only in the ordinary course of his business. Taylor *v.* M'Keand - 358

BOROUGH VOTE—Alteration of parish - 87
See Parliament. 4.

—— Notice of objection - - 225, 231
See Parliament. 1, 3.

BUILDING SOCIETY—*Unincorporated—Certified Rules—Borrowing in Excess of prescribed Limit—Agent—Authority—"Holding out" by Society and Directors—Liability.*] By the certified rules of an unincorporated building society the directors might borrow money not exceeding a prescribed amount. Loans were made to the society through its secretary who was also acting treasurer; the usual course of business was that he delivered to the lenders a receipt and undertaking on behalf of the directors to give promissory notes signed by the directors, and subsequently exchanged such notes for the receipt and undertaking. After a total amount had been borrowed exceeding that limited by the rules, the plaintiffs paid a sum to the secretary as a loan to the society, and received from him the usual receipt and undertaking, but no promissory notes. This sum he appropriated to his own use. In an action against the society and directors the jury found that the society held out the secretary to the plaintiffs as having authority to receive the loan on their behalf on the terms on which it was received, and that the directors did the same:—*Held*, by Lord Coleridge, C.J., that although money had been borrowed in excess of the total amount limited by the rules, and they might therefore afford protection to the society or its members as between themselves and the directors, yet that the society and directors having for a purpose legal in itself authorized the loan made by the plaintiffs were both liable to them. Chapleo *v.* Brunswick Benefit Building Society - - - - - 331

CARRIER—By railway—Ticket issued by one company—Injury whilst travelling by train of another - - - 157
See Railway. 2.

—— By railway—Ticket in coupons—Notice of conditions - - - - 1
See Railway. 1.

CASES: *Amos* v. *Chadwick* (4 Ch. D. 869; 9 Ch. D. 459) followed - - - 339
See Practice. 6.
—— *Coxhead* v. *Mullis* (3 C. P. D. 439) commented upon - - - 410
See Infant.
—— *Gover's Case* (1 Ch. D. 182) discussed 455
See Company.
—— *Henderson* v. *Stevenson* (Law Rep. 2 H. L., Sc. 470) distinguished - - 1
See Railway. 1.
—— *Northcote* v. *Doughty* (4 C. P. D. 385) commented upon - - - 410
See Infant.
—— *Saner* v. *Bilton* (7 Ch. D. 815) followed 507
See Landlord and Tenant.
—— *Stowe* v. *Jolliffe* (Law Rep. 9 C. P. 734) considered - - - - 231
See Parliament.
—— *Twycross* v. *Grant* (2 C. P. D. 469) discussed
See Company. [455
CHANCEL—Dedication—Prescription - 390
See Church.
CHAPEL—Right of presentation—Vicar - 194
See Church. 2.
CHEQUE—Crossed, but without words "not negotiable"—Bonâ fide payment by banker
See Banker. [7

CHURCH—*Grant—Collegiate Church—Chancel—Dedication — Dissolution of Ancient Monastic Priory — Surrender to the Crown — Re-grant—Light — Prescription — Prescription Act* (2 & 3 *Wm.* 4, *c.* 71), *ss.* 3, 4—*Lost Grant.*] The monastic priory of Arundel was suppressed or dissolved in the reign of Richard II. (about the year 1380), and a college consisting of a master or warden, and twelve seculars or chaplains was by the King's licence created in its stead. The instrument of foundation contained rules or statutes for the government of the members of the college, and for the services to be celebrated "in ecclesiâ præfatâ."—The church of St. Nicolas Arundel, which architecturally considered, was one entire building, all apparently of the same date, was a "cross-church," with a nave and aisles; a central tower; transepts rather shorter than would be usual in a church of such proportions; and eastward of the central tower and transepts, a chapel (known as the Fitzalan Chapel) occupying the place commonly filled by the parish chancel; a north aisle called the Lady Chapel; and at the north-east corner a room originally a "sacristy," but which had for many years been used as a school room, and as a place where the elections to offices in the corporation of Arundel were habitually held.—In 1511, disputes having arisen between the college and the corporation of Arundel as to the repair of "ye crosse-partes" or transepts, the bell-tower of the church, the bells and bell-furniture therein, they were submitted for arbitration to the then Earl of Arundel and the then Bishop of Chichester. These "crosse-partes" were described as going from south to north "inter chorum et navem ecclesiæ;" and the award of the Earl and Bishop was as follows:—The college are solely to repair the south transept, "quæ cancellus parochialis vulgariter nuncupatur;" the corporation and the parish are solely

CHURCH—*continued.*

to repair the north transept and the whole of the nave and its aisles; and the expense of keeping up and repairing the bell-tower, bells, and bell-furniture is to be defrayed by the corporation and the parish on the one part, and the college on the other part, in equal moieties.—In the 26th year of Henry VIII. (1544) the master or warden and chaplains of the college surrendered to the King "totam cantariam sive collegium nostrum prædictum; ac etiam totum scitum, fundum, circuitum, ambitum, vel procinctum, ac ecclesiam, campanile, et cimiterium ejusdem cantariæ sive collegii, cum omnibus et omnimodis domibus, ædificiis, ortis, pomariis, gardinis, terrâ et solo infra dictum circuitum et procinctum cantariæ sive collegii prædicti, &c." In the same year the King in almost the same words granted the college and its possessions to Henry Earl of Arundel and his heirs, through whom the plaintiff claimed.—Since the surrender and re-grant of 1544 no act of religious worship had taken place nor had prayers been said within the walls of the Fitzalan Chapel, with the exception of reading the burial service of the Church of England over the bodies of members of the plaintiff's family which had been buried there; and during the whole of that time the plaintiff and his predecessors had claimed to exclude, and had in fact excluded, the vicar and parishioners of Arundel from the whole of the Fitzalan Chapel. An iron lattice-work or grille filling the arch which would be commonly called the "chancel arch," and which apparently was as old as the Fitzalan Chapel itself, and divided it from the rest of the structure, was locked on the eastern side (there being no key-hole on the other side), and the key was always kept by the plaintiff and his predecessors in title. Vaults had been made and interments had taken place both in the Fitzalan Chapel and in the Lady Chapel, at their sole pleasure. No faculty had ever been applied for, nor had any fees been paid in respect of such vaults and interments. Against these acts of ownership exercised by the plaintiff's predecessors during more than 300 years, there was not a single act of ownership proved on the part of either the vicar or the parishioners. The answers returned by successive churchwardens for a long series of years (from 1844 to 1875) to articles of visitation episcopal and archidiaconal, for the most part shewed that they assumed the south transept to be the chancel of the parochial church. In 1873 the plaintiff erected a wall across the west end of the Fitzalan Chapel: in 1877 the defendant, who was vicar of Arundel, pulled down part of it. There had been some correspondence as to the respective rights of the parties; but the plaintiff declined negotiation and claimed the Fitzalan Chapel as his property:—*Held*, that these facts above stated shewed that the building in question was not the chancel of the parochial Church of St. Nicolas Arundel, but had always remained the property of the Duke of Norfolk and his predecessors, and that a legal origin for the plaintiff's claim must be presumed.—*Held*, further, that the defendant could not justify the pulling down part of the wall on the ground that he was entitled to the access of light from the Fitzalan Chapel into the parochial church: for such a claim could not be justified either by prescription at common law,

CHURCH—*continued.*

under the Prescription Act (2 & 3 Wm. 4, c. 71), ss. 3, 4, or by virtue of a lost grant. Duke of Norfolk *v.* Arbuthnot - - **C. A. 390**

2. —— *Parish—Chapel within—Endowed and Consecrated—Right of presentation to*—14 & 15 *Vict. c.* 97, *s.* 11—*Notices thereunder—Patron and Incumbent — Acquiescence—Estoppel—Practice—Procedure—Third Parties—Order XVI., rr.* 18, 20, 21—*Discovery to Plaintiff.*] 1. Claim: That the plaintiff was vicar of a parish; that a chapel was erected within it, and endowed and consecrated for the administration of the sacraments and the performance of all other divine offices according to the rites of the Church of England; that the plaintiff as such vicar was entitled to nominate and present, and had nominated and presented, a clerk to the chapel, but another clerk had been licensed, instituted, and admitted by the defendant bishop on the nomination and presentation of certain other defendants, who thereby hindered the plaintiff in the exercise of his right; and he claimed to have his right established and declared.—Defence of the last-mentioned defendants: That certain freeholders had erected the chapel and conveyed it to the Ecclesiastical Commissioners, and applied to them under 14 & 15 Vict. c. 97, to declare the right of nomination to be in the defendants who had endowed the chapel, and that before making such declaration a copy of the application was according to the Act sent by the Commissioners to the plaintiff, he being both patron and incumbent of the parish; that if he had ceased to be patron he stood by and knowingly allowed those defendants to endow the chapel and procure the same to be consecrated in the belief entertained by them as he well knew that he was patron, and that the sending of such copy to him was in fact a sending of a copy both to the patron and incumbent, as required by the Act, and the plaintiff was therefore estopped from denying that he was patron; and that the right of nomination had been declared to be in those defendants, who afterwards nominated.—On demurrer to the allegation of estoppel:—*Held*, that it was bad, because the rights of the vicar were not merely private but were accompanied by spiritual and other duties in which his parishioners were interested, and he could not therefore waive or divest himself of those rights and duties by the conduct imputed to him.—But *held*, also, that the claim was bad, inasmuch as it did not allege that the chapel was a chapel of ease, or otherwise shew any right in the vicar to nominate and present a clerk to it.—2. The defendants claiming relief over against the Ecclesiastical Commissioners served upon them a notice under Order XVI., rule 18. They entered an appearance under rule 20, and an order was afterwards made at chambers under rule 21 that they should be at liberty to appear and defend this action, so far as related to the question whether all things required to be done by them, in order to enable them as against the plaintiff to make a valid declaration of the right of nomination and to vest that right in the defendants, were done by them, and that they should be bound by the finding upon that question. The plaintiff then obtained an order on the Ecclesiastical Commissioners for discovery of documents:—*Held*, that the third parties having appeared in the action to litigate with the plaintiff, he was entitled to discovery from them, and the order for it was right. MacAllister *v.* Bishop of Rochester - - - - - **194**

CHURCH—*continued.*

COMMITMENT UNDER DEBTORS ACT, 1869—Means of judgment debtor - **366**
See Debtors Act.

COMPANY—*Prospectus—Concealment of Contract —Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.] B. & C., being possessed of a patent, agreed to sell it to a company for 56,000*l.*, but by a series of contracts it was arranged that only 2000*l.* out of that sum should be retained by them for their own use, and that 54,000*l.* should be divided between the promoters of the company. The prospectus, issued on behalf of the company, did not mention the contracts relating to the disposal of the purchase-money of the patent. The defendants were promoters and directors of the company. The plaintiff subscribed for shares, but he afterwards sued the defendants to recover the price of the shares subscribed for by him:—*Held*, upon demurrer, by Baggallay and Thesiger, L.JJ. (Bramwell, L.J., dissenting), that the contracts as to the disposal of the purchase-money of the patent ought to have been specified in the prospectus pursuant to the Companies Act, 1867, s. 38, and that the defendants were liable to the plaintiff for the price of his shares.—*Gover's Case* (1 Ch. D. 182) and *Twycross* v. *Grant* (2 C. P. D. 469) discussed. Sullivan *v.* Mitcalfe - - - - **C. A. 455**

CONSOLIDATION OF ACTIONS—Stay of proceedings—Application by plaintiffs - **339**
See Practice. 6.

CONTRACT—*Sale of Goods—Offer—Acceptance—Withdrawal of Offer—Letter posted before but received after Acceptance.*] An offer of a contract sent by letter cannot be withdrawn by merely posting a subsequent letter which does not, in the ordinary course of the post, arrive until after the first letter has been received and answered.—By letter of the 1st of October the defendants wrote from Cardiff offering goods for sale to the plaintiffs at New York. The plaintiffs received the offer on the 11th and accepted it by telegram on the same day, and by letter on the 15th. On the 8th of October the defendants posted to the plaintiffs a letter withdrawing the offer. This letter reached the plaintiffs on the 20th:—*Held*, by Lindley, J., that the withdrawal was inoperative, a complete contract binding both parties having been entered into on the 11th of October when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose was withdrawn. Byrne *v.* Van Tienhoven - - - - - **344**

CORPORATION—Evidence of incorporation **431**
See Fishery.

—— Foreign attachment - - - **494**
See Mayor's Court.

COSTS—Power of judge at nisi prius without application to disallow costs - - **27**
See Practice. 2.

COUNTY—Vote—Equitable interest in copyhold
See Parliament. [97

COUNTY COURT—*Appeal—Judge's Note—Request for "at the Trial"*—38 & 39 *Vict. c.* 50, *s.* 6.] 38 & 39 Vict. c. 50, prescribing a mode of appeal by motion from the county court, by s. 6 enacts that "at the trial or hearing" of the cause "the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause:"—*Held*, that the request for a note must be made during or immediately at the end of the trial or hearing of the cause; and, therefore, that a request not made until an hour and a half after judgment given was too late. Pierpoint *v.* Cartwright - - - - - - 139

COVENANT—To pay rates, taxes, and assessments - - - - 481
See Landlord and Tenant. 2.

CUSTOM—Inconsistent with charterparty - 130
See Ship. 2.

DAMAGES, MEASURE OF—*Railway Accident—Loss of Profits of Trade or Profession—Misdirection.*] In an action against a railway company for personal injury to a passenger, the jury in assessing the damages may take into their consideration, besides the pain and suffering of the plaintiff, and the expense incurred by him for medical and other necessary attendance, the loss he has sustained through his inability to continue a lucrative professional practice. Phillips *v.* London and South Western Railway Company [C. A. 280

DEBTORS ACT, 1869 (32 & 33 *Vict. c.* 62)—*Order of Commitment—Means of Judgment Debtor—Wife's separate Estate.*] The defendant was committed to prison for six weeks for default in payment of an instalment of 10*l.* pursuant to an order under the Debtors Act, 1869, upon an affidavit by the plaintiff that the defendant was residing in a large well-furnished house, keeping horses, carriages, a groom, and other servants, and living in the style of a country gentleman of means; that he had been seen on several occasions at different towns and places with his horse and carriage, and always appeared to have money at his command; and that the plaintiff was informed and believed that he had ample means to pay the debt and costs in the action:—*Held*, that the order of commitment must be affirmed, although the defendant swore that all the furniture, horses, carriages, and effects at the house above-mentioned belonged to his wife and were bought and maintained by her separate money and estate; that the groom and other servants were the servants of his wife and maintained at her sole expense; that he had no horse or carriage or any other property of his own, nor had he money at his command that would enable him to attend Court to answer the application, and his wife declined to supply him with any; and that he was unable to pay the debt and costs in the action. Harper *v.* Scrimgeour 366

DEFAMATION—*Libel—Expression of lawful Intention—Innocent Meaning of Writer—Injurious Imputations inferred from Words — Innuendo — Evidence of — Privileged Occasion — Express Malice.*] The plaintiffs were the "Capital and Counties Bank," which had a branch at Chichester and other branches in Sussex and Hampshire.

DEFAMATION—*continued.*

The defendants were brewers at Chichester, and had many customers and tenants occupying public-houses in different parts of the same counties. These customers and tenants were accustomed to cash cheques for persons who visited their houses, and afterwards to hand the cheques, which were drawn on various banks, to the defendants' collector in payment of accounts. The collector used to pay the cheques in to the plaintiffs' account at the Chichester branch bank, where the cheques were received as of course. But a new manager of that branch bank objected to cash such cheques as were drawn on other branch banks. The defendants informed him that if he would not do so they should issue an order to their tenants not to cash cheques of the plaintiffs' bank, at least with the intention of paying the collector with them. The manager replied that he must certainly decline to cash cheques on the other branches of the bank when presented by parties unknown to him, though as a matter of grace he was quite willing to cash cheques to the defendants' representatives if properly introduced to him, with proof that they had power to sign for the defendants' firm, and that he was quite indifferent as to their sending out orders to their tenants not to cash the plaintiffs' cheques. Thereupon the defendants caused to be printed and sent to 137 of their customers and tenants aforesaid the following circular:—"Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank."—This publication of the circular caused a run on the bank and loss to the plaintiffs. They brought an action for libel. The statement of claim set out the circular as the libel, and alleged by an innuendo the meaning to be that the plaintiffs were not to be relied upon to meet the cheques drawn upon them, and that their position was such that they were not to be trusted to cash the cheques of their customers. At the trial the question of libel or no libel was left to the jury, with a direction that the circular, if, under the circumstances, libellous, was published on a privileged occasion, unless there was express malice. The jury failed to agree, and were discharged. On motion to enter judgment for the defendants:—*Held*, by the Common Pleas Division, that the circular was capable of the meaning alleged, and there was evidence to support the innuendo and also of express malice, and the case must go again to a jury.—On appeal:—*Held*, reversing the decision of the Court below (Thesiger, L.J., dissenting), that there was no evidence that the circular was defamatory in either a primary or a secondary sense, and that, even if there was any such evidence, the circular was issued on a privileged occasion, and there was no evidence of express malice. Capital and Counties Bank *v.* Henty - - - - - - C. A. 514

DISCOVERY—Third parties—Practice - 194
See Church. 2.

ECCLESIASTICAL COMMISSIONERS—Chapel—Right of nomination - - 194
See Church. 2.

ELECTION OF TOWN COUNCILLOR 183, 253
See Municipal Corporation. 1, 2.

ELECTION—Member of school board—Corrupt practices—Petition - - 191
See Elementary Education.

ELEMENTARY EDUCATION—*Election—School Board*—33 & 34 *Vict. c.* 75, *ss.* 31, 33—*Ballot Act*, 1872 (35 & 36 *Vict. c.* 33)—*Elementary Education Amendment Act*, 1873 (36 & 37 *Vict. c.* 86), *s.* 26, *Sched.* 2—*Corrupt Practices (Municipal) Act*, 1872 (35 & 36 *Vict. c.* 60), *s.* 2.] By the Elementary Education Act, 1870, s. 33, questions as to the right of any person to act as a member of a school board may be inquired into by the Education Department. A petition against his election cannot be sustained under the Corrupt Practices (Municipal) Act, 1872, for although the provisions of the Ballot Act, 1872, have been applied to school board elections by the Elementary Education Amendment Act, 1873, s. 26, sched. 2, the provisions of the Corrupt Practices (Municipal) Act, 1872, have not been applied to such elections, notwithstanding the terms of s. 2 enacting that this Act shall, so far as is consistent with the tenor thereof be "construed as one" with the Acts relating to boroughs and elections in boroughs. In re West Bromwich School Board - - - - - - 191

EXECUTOR—*Administration—Assets of deceased Person—Priority of Judgment Creditor.*] The priority which a judgment-creditor is entitled to in the administration of the assets of a deceased person under a decree in an administration suit, is not affected by s. 10 of the Judicature Act, 1875, whether such judgment be registered or not. Smith *v.* Morgan - - - 337

FISHERY—*Oysters—Navigable River—Corporation—Crown Grant of "Waters"—Several Fishery—Prescription—Claim of Inhabitants to Dredge—Immemorial Usage—No Evidence of Incorporation by Crown.*] The plaintiffs, the mayor and the free burgesses of a borough, were incorporated by royal charters, and entitled to a several oyster fishery in a tidal navigable river. They sued the defendants for trespasses to the fishery. The defendants were free inhabitants of ancient tenements in the borough. The free inhabitants of ancient tenements in the borough had from time immemorial, without interruption and claiming as of right, exercised the privilege of dredging for oysters in the river, from the 2nd of February in each year to Easter Eve in each year, and of catching and carrying away the same without stint for sale and otherwise. The acts complained of were done in exercise of this privilege. The usage to dredge oysters without stint for the purposes of sale or otherwise tended to the destruction of the oyster fishery, and, if continued, would destroyed the fishery. The defendants claimed to exercise the privilege: (1), as subjects of the realm; (2), as free inhabitants of the borough; (3), as free inhabitants of ancient tenements in the borough:—*Held*, that they could not maintain such privilege on any of the grounds alleged, as it was inconsistent with, antagonistic to, and destructive of the plaintiffs' several fishery; and that the Court could not from the immemorial user alone, and in the absence of any evidence of an incorporation of the free inhabitants, presume a legal origin for the privilege by Crown grant to them. Mayor of Saltash *v.* Goodman - - - - - 431

FISHERY—*continued.*

FIXTURES—Lease and underlease - 143
See Landlord and Tenant.

FREEHOLDER—City being county of itself—Residence for six months - 59
See Parliament, County Vote.

HIGHWAY—*Repair—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—"*Excessive Weight*"—"*Extraordinary Traffic.*"] The appellant employed on a highway a traction-engine drawing two waggons for the carriage of materials and goods used for ordinary purposes on his estate (the engine being of less weight than was allowed by s. 28 of the Highways and Locomotives (Amendment) Act, 1878, and having its wheels constructed in accordance with the provisions of that section), and thereby did damage to the highway beyond that caused by the ordinary wear and tear:—*Held*, that this was "excessive weight" and "extraordinary traffic," the damage caused by which was properly chargeable upon the appellant under s. 23 of the Act.—Judgment of the Common Pleas Division, 5 C. P. D. 211, affirmed. Lord Aveland *v.* Lucas [C. A. 351

HUSBAND AND WIFE—Separate estate—Commitment of husband under Debtor's Act, 1869 - - - - 366
See Debtors Act.

INFANT—*Promise to Marry—Infants Relief Act*, 1874 (37 & 38 *Vict. c.* 62)—*Ratification or fresh Promise.*] In July, 1875, the plaintiff and defendant (both being then under the age of twenty-one) mutually agreed to marry one another. The engagement continued without any definite understanding as to when the marriage was to take place until March, 1879, when (both having attained the age of twenty-one) the defendant asked the plaintiff, in the presence of her father, to fix the wedding-day. She fixed it for the 5th of June, to which the defendant assented: but ultimately he broke his promise.—In an action for this breach of promise, in which it was agreed that the damages should be assessed, subject to the opinion of the Court as to whether or not that which took place in March, 1879, was evidence from which the jury might and ought to infer a fresh promise to marry after the defendant had attained twenty-one, within s. 2 of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), or a mere ratification of the original void promise:—*Held*, by Denman and Lindley, JJ., that what took place in March, 1879, when the wedding-day was fixed, was a fresh promise made after the defendant came of age, and upon a good consideration.—By Lord Coleridge, C.J., that it was a mere ratification of the original promise made by the defendant during his minority, and not a binding promise within the statute.—*Coxhead* v. *Mullis*, 3 C. P. D. 439, and *Northcote* v. *Doughty*, 4 C. P. D. 385, commented upon. Ditcham *v.* Worrall 410

INSURANCE (MARINE)—*Action by Assignee of Policy—Set-off by Insurers of Claims against*

INSURANCE (MARINE)—*continued.*

Assured—Polices of Marine Insurance Act, 1868 (31 & 32 *Vict. c.* 86), *s.* 1—*Rules of the Supreme Court*, 1875, *Order XIX*, *rule* 3—"*Set-off*"—"*Counter-claim.*"] In an action by the assignee of a policy of marine insurance, the insurers are not entitled to set-off a debt incurred with them by the assured for premiums on policies effected with them by the assured after the date of the assignment; for the claim under a policy for a loss is for unliquidated damages to which no set-off could be pleaded at law under the Statutes of Set-off in an action by the assured, nor in equity in a suit by the assignee, and therefore the debt incurred by the assured is not a "defence" open to the insurers under 31 & 32 Vict. c. 86, s. 1, that statute being intended merely to amend procedure and not to alter the rights of the parties to the policy; nor is the debt incurred by the assured the subject of "set-off" or "counter-claim" within the meaning of the Rules of the Supreme Court, Order XIX., rule 3. PELLAS *v.* NEPTUNE MARINE INSURANCE CO. - - C. A. 34

2. —— *Valued Policies — War — Destruction of Cargo by Enemy—Payment of Policies—Compensation paid by Neutral State—Right of Injured Party—Money received for Indemnities.*] The plaintiffs, underwriters, granted to the defendants valued policies of insurance, including war risks, on a cargo of a United States merchant ship. During war between the United States and the Confederate States of America, a confederate cruiser, the *Alabama*, went out from a port of Great Britain, a neutral country, and destroyed the ship with others belonging to subjects of the United States.—The plaintiffs paid to the defendants as and for an actual total loss the amounts named in the policies, but the cargo was of greater real value.—A claim in respect of the damage done by the *Alabama* was made by the United States on great Britain and was referred to arbitration, resulting in an award under which Great Britain paid to the United States a sum for compensation. The United States passed an Act of Congress forming courts for the distribution of this sum amongst subjects who had been injured, and whose losses were not fully covered by insurance. The defendants claimed in those courts, and received part of such compensation money for their loss exceeding the amount insured. The plaintiffs were prevented by the Act from making any such claim. They now sued the defendants to recover the compensation money so obtained by them.—*Held*, by Lord Coleridge, C.J., that there having been an actual total loss the valued policies were, as between the parties, conclusive of the value of the cargo; and that as the United States had distributed the sum received by them amongst their subjects, the defendants, although without any legal right to the amount received by them, had nevertheless a moral or equitable right to it, and obtained it under circumstances which made them trustees of it for the plaintiffs who, notwithstanding the provisions of the Act of Congress, could recover it in an English Court. BURNAND *v.* RODOCANACHI - - - 424

INTERROGATORIES—Privilege—Corporation—Solicitor - - - - 106
See PRACTICE. 3.

INTERROGATORIES—*continued.*

—— Relevancy and materiality - - 47
See PRACTICE. 6.

—— Petition—Parliamentary election - 546
See PARLIAMENT—ELECTION PETITION.

JUDGMENT CREDITOR—Priority—Administration suit - - - - 337
See EXECUTOR—ADMINISTRATION.

LANDLORD AND TENANT—*Lease—Covenants—Express—Implied—Underlease—Fixtures.*] An underlease of a nursery ground contained an express covenant by the underlessee to deliver up all landlord's fixtures thereon at the end of the term:—*Held*, that a representation and covenant by the grantors of the underlease that the underlessee should be at liberty, without hindrance from any one, to remove trade fixtures during the term, and that the grantors had not entered into covenants inconsistent with such right, could not be implied. PORTER *v.* DREW - - 143

2. —— *Covenant by Tenant to pay "all Taxes, Rates, Duties, and Assessments"—Expense of repairing defective Drainage—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94, 95, 96, 98, 104.] The defendant was tenant to the plaintiffs of certain hereditaments under a lease, by which he was bound to "bear, pay, and discharge . . . all other taxes, rates, duties, and assessments whatsoever, whether parliamentary, parochial, or otherwise." The drainage having become defective, the sanitary authority of the borough within which the hereditaments were situate caused a notice to be served upon the plaintiffs requiring them, as owners, to abate the nuisance, and the notice not having been complied with, obtained an order from a justice to the like effect. The plaintiffs having executed the works necessary to enable them to obey the order, sought to recover the cost of them from the defendant under the foregoing covenant:—*Held*, by Baggallay and Bramwell, L.JJ. (Brett, L.J., dissenting), that the action was maintainable. BUDD *v.* MARSHALL [C. A. 481

3. —— *Floors of Warehouse—Overloaded by Tenant—Fall of Premises—Covenants to repair—Waste—Liability for Rent and Damages.*] The plaintiffs demised certain floors in a warehouse to the defendant at a rent. He covenanted to repair, maintain, and keep the inside of the premises in good and tenantable repair and condition, and to deliver them up at the end of the term, damage by fire, storm, or tempest, or other inevitable accident, and reasonable wear and tear only excepted. The plaintiffs covenanted to keep the walls, roof, and main timbers of the premises in good and substantial repair and condition. The lease also contained a provision for the suspension of the rent in the event of the premises being burnt down, or damaged by fire, storm, or tempest. —Sub-lessees of the defendant overloaded a floor with flour, in consequence of which the whole building fell. The plaintiffs rebuilt it and sued for rent during the time the building was unoccupied, and for damages. The defendant denied liability, and claimed damages from the plaintiffs. —*Held* (1.), that notwithstanding the fall, the

LANDLORD AND TENANT—*continued.*

defendant was liable to pay the rent; (2.), that there was no implied warranty by the plaintiffs that the building was fit for the purpose for which it was to be used; (3.), that, in the absence of notice to them of any damage or want of repair, the plaintiffs were not liable on their express covenant to keep the walls, roof, and main timbers of the building in repair; (4.), that on the authority of *Saner* v. *Bilton* (7 Ch. D. 815) the destruction of the building, if caused by using the property demised in what was apparently a reasonable and proper manner, having regard to its character and to the purposes for which it was intended to be used, was not waste, and therefore the tenant would not be liable to pay damages for it; (5.), that as the case was not within the exceptions in his express covenant to repair, he was liable under it to the cost of putting the inside of the floors demised, and the fixtures therein in good and tenantable repair. MANCHESTER BONDED WAREHOUSE COMPANY *v.* CARR - - 507

LIBEL—Innuendo—Evidence of malice - 514
See DEFAMATION.

LICENSING ACTS, 1872 (35 & 36 *Vict. c.* 94), *s.* 25, *and* 1874 (37 & 38 *Vict. c.* 49), *s.* 30—*Supplying Intoxicating Liquor during prohibited Hours—"Private Friends."*] P. gave a dinner to some friends at a licensed house kept by L. On the breaking up of P.'s party, L. invited nine of P.'s guests, including the appellant, to remain after the hour for closing, to partake of two bottles of claret at his (L.'s) expense. Upon an information charging these nine persons with being found on the premises during prohibited hours, the justices, though satisfied of the bona fides of the transaction, convicted them under s. 25 of the Licensing Act, 1872, on the ground that the landlord, on the arrival of the hour for closing, could not convert them into "private friends," for the purpose of their consuming the wine so supplied to them by him:—*Held*, that the conviction was right. CORBET *v.* HAIGH - - - - - 50

LIMITATION OF ACTIONS—*Bond executed in India—Specialty and Simple Contract Debts—Same Period of Limitation—Action in England not barred for Twenty Years.*] Specialty debts in India have no higher legal value nor greater efficacy than simple contract-debts; and the same period of limitation, viz., three years, bars the remedy for both, but—*Held*, by LOPES, J., that where an action on a bond executed in India is brought in England, the bond cannot be treated as a simple contract; and, therefore, as the English Statutes of Limitation apply, the remedy is not barred until after the lapse of the period of twenty years prescribed by 3 & 4 Wm. 4, c. 42, s. 3, as the limitation for actions on contracts under seal. ALLIANCE BANK OF SIMLA *v.* CAREY [429

2. —— *Tenancy at Will*—3 & 4 *Wm.* 4, *c.* 27, *s.* 7—37 & 38 *Vict. c.* 57.] In the year 1850, an Act (13 Vict. c. v.) was passed to enable commissioners (appointed by 6 Geo. 4, c. cxxix.) for managing the affairs of Brighton to purchase the Pavilion estate. By s. 19 of the Act, the commissioners were expressly prohibited from letting or selling any part of the property to be so acquired by them without the consent of the vestry. In 1854, the town of Brighton was incorporated, and in 1855 the powers and property of the commissioners under the Act of 6 Geo. 4 were transferred to the corporation. Down to the year 1853 the guardians of the poor of Brighton had had the use of offices in the Town Hall. On the 7th of March in that year they removed (by arrangement with the commissioners) to buildings which formed part of the Pavilion estate, in the adaptation of which to their purposes they expended a considerable sum of money; and they continued in the exclusive occupation of their new offices without payment of rent or any acknowledgment of title in the commissioners or the corporation, down to the 19th of November, 1879, when an action was brought by the latter to recover possession:—*Held*, that, inasmuch as the guardians had had the exclusive possession of the offices for more than twelve years (assuming their relation to the corporation to have been that of tenants at will), the claim of the corporation was barred by the Statute of Limitations, notwithstanding the prohibition against letting or selling without the consent of the vestry, contained in the local Act. MAYOR OF BRIGHTON *v.* GUARDIANS OF BRIGHTON - - - - - 368

LIQUIDATION—Statement of debts—Misdescription - - - - - 354
See BANKRUPTCY. 2.

LOCAL GOVERNMENT ACTS—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257—*Streets—Works therein—Apportionment of Expenses, how far conclusive—Deposit of Plans—No condition precedent.*] An apportionment of street expenses, made under 38 & 39 Vict. c. 55 (The Public Health Act, 1875), s. 150, and not disputed within three months from notice of it to the owner of the premises in respect of which the expenses were incurred, is binding and conclusive upon him by s. 257, and, therefore, in an action against him for the amount apportioned, the apportionment cannot be treated as a nullity merely because it mixed up the expenses of more than one street, and, in the opinion of the judge, reasonable opportunities were not afforded of inspecting the plans and estimate deposited according to s. 150, before the expenses were incurred.—The deposit of plans and an estimate is not a condition precedent to the recovery of such expenses. SHANKLIN LOCAL BOARD *v.* MILLAR - - - - 272

2. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150—*Footway, Apportionment of Expenses—Premises "fronting, adjoining, or abutting."*] An urban authority, acting under 38 & 39 Vict. c. 55 (The Public Health Act, 1875), s. 150, repaired the footway on the south side of a street, and apportioned the whole cost among the owners and occupiers of premises on the south side only:—*Held*, that the apportionment was right. WAKEFIELD SANITARY AUTHORITY *v.* MANDER - 248

LODGER—Borough vote - - - 235
See PARLIAMENT. 2.

MARRIAGE—Promise of—Infant - - 410
See INFANT.

MAYOR'S COURT—*Foreign Attachment—Corporation.*] A joint stock bank sued for a prohibition to restrain proceedings in foreign attachment

MAYOR'S COURT—*continued.*

against them as garnishees, having in their hands moneys of T. G. The defendants pleaded a custom that on a plaint of debt being brought in the Lord Mayor's Court the Court might summon the defendant, and that if the serjeant-at-mace certified that the defendant had nothing in the city whereby he might be summoned, and the defendant made default in appearing, and the plaintiff alleged that some other person in the city had goods of the defendant in his hands, then the Court should command the serjeant to attach the defendant by such goods, that if the serjeant certified to the Court that the defendant had been attached by such goods, and if the defendant at that Court and three subsequent Courts being solemnly called did not appear, then after such four defaults had been recorded the Court might call on the garnishee to appear and shew cause why the plaintiff should not have judgment and execution of such goods, and that if he did not appear then the Court had authority to award the plaintiff to have judgment and execution of the goods. The plea went on to allege that S. G. had brought a plaint of debt against T. G., that T. G. had been summoned and had not appeared; that the serjeant had returned that T. G. had nothing within the city by which he could be summoned; that S. G. had alleged that the plaintiffs had goods of T. G. in their hands, and that thereupon the Court had ordered the serjeant to attach T. G. by those goods, and that the serjeant had certified to the Court his having done so, and that T. G. at the same Court was solemnly called but did not appear, and that T. G. had made default at three subsequent Courts, which defaults had been recorded. T. G. had in fact never been summoned nor received any notice of S. G.'s plaint. The proceedings to attach his property having been carried on without notice to him according to the course of foreign attachment as practised for the last two centuries, although in making up the record on the appearance of the garnishee it has been the practice to insert fictitious statements, such as those contained in the above plea, as to the defendant being summoned and making default:—*Held*, that the allegations that T. G. had been summoned and made default were of the substance of the plea, and that as they were untrue the custom had not been followed, and a prohibition to restrain the proceedings had rightly been granted. *Semble*, per James and Bramwell, L.JJ., that proceedings in foreign attachment cannot be taken against a corporation as garnishees. London Joint Stock Bank *v.* Mayor of London - - **C. A. 494**

MINE—*Coal Mines Regulations Act*, 1872 (35 & 36 *Vict. c.* 76)—*Agent, liability of—Inadequate Ventilation.*] The agent of a mine subject to the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76) may be convicted for breach of the regulations prescribed by ss. 51, 52 of the Act, although the mine is under the control of a duly certified manager. Wynne *v.* Forrester - - **361**

MORTGAGE—Consolidation—Bill of Sale - **266**
See Bill of Sale. 5.

MUNICIPAL CORPORATION—*Town Councillor—Qualification of—"Entitled to be on" Roll—5 & 6 Wm. 4, c. 76, s. 28—"On" Roll—38 & 39 Vict. c. 40, s. 1, sub-s. 2.*] To be eligible for the office of town councillor, a candidate must be "entitled to be on" the burgess roll within 5 & 6 Wm. 4, c. 76, s. 28, as well as "on" the roll within 38 & 39 Vict. c. 40, s. 1, sub-s. 2, and the burgess roll containing his name is not conclusive evidence that he is "entitled to be on" the roll. Middleton *v.* Simpson - - - **183**

2. —— *Candidate for Office of Town Councillor—Nomination Paper—Statement of Number on Burgess Roll of Nominator*—38 & 39 *Vict. c.* 40, *s.* 1, *sub-s.* 2, *Sched.* 1, *Form* 2; 41 & 42 *Vict. c.* 26, *s.* 41; 35 & 36 *Vict. c.* 33, *s.* 13.] The number on the burgess roll of a burgess nominating a candidate at a municipal election for the office of town councillor, must, in order to satisfy the requirements of 38 & 39 Vict. c. 40 (The Municipal Elections Act, 1875), s. 1, sub-s. 2, Sched. 1, Form 2, and Note, be stated in the nomination paper. Therefore, where, instead of the right number 695, the number 704 appeared in such paper, and an objection taken thereto was allowed by the returning officer, although no one had been or could be misled by the mistake:—*Held*, that the decision of the returning officer was correct, and that the effect or the mistake was not remedied by and could not be amended under the provisions of 41 & 42 Vict. c. 26, s. 41, and 35 & 36 Vict. c. 33, s. 13. Gothard *v.* Clarke [253

3. —— *Petition—Notices—Service of—Condition Precedent to Trial*—35 & 36 *Vict. c.* 60, *s.* 13, *sub-s.* 4.] It is a condition precedent to the trial of a municipal election petition that, within five days after the presentation of it, the petitioner should in the prescribed manner serve on the respondent a notice of the presentation, and of the nature of the proposed security, and a copy of the petition as required by 35 & 36 Vict. c. 60, s. 13, sub-s. 4. Williams *v.* Mayor of Tenby - **135**

NEGLIGENCE—Injury to passenger by railway—Damages - - - - **280**
See Damages.

PARLIAMENT—*Borough Vote—Incapacited Persons—Receipt of Parochial Relief—Notice of Objection—Duty of Revising Barrister under* 41 & 42 *Vict. c.* 26, *s.* 28, *sub-s.* 7.] The revising barrister is required by sub-s. 7 of 41 & 42 Vict. c. 26, s. 28, to expunge the name of every person, whether objected to or not, where it is proved before him that such person was on the last day of July then next preceding, incapacitated by any law or statute from voting at an election for the parliamentary borough, or an election for the municipal borough, as the case may be, to which the list relates:—*Held*, that the "incapacity" here referred to means such incapacities as those mentioned in *Stowe* v. *Jolliffe* (Law Rep. 9 C. P. 734), not a mere temporary disqualification by reason of the receipt of parochial relief during the qualifying period: consequently, that, in absence of a notice of objection, the revising barrister was not bound to expunge the name of a person who had been in the receipt of such relief. Hayward *v.* Scott - - - - - - **231**

2. —— *Borough Vote—Lodger Franchise*—30 &

PARLIAMENT—*continued.*

31 *Vict. c.* 102, *s.* 4—*Amendment of Mistake in Claim under* 41 & 42 *Vict. c.* 26, *s.* 28, *sub-s.* 2—*Discretion of Revising Barrister.*] A claim by a lodger under 41 & 42 Vict. c. 26, s. 22, in the form in the schedule (H.) No. 2, for the first time to have his name inserted in the list of persons entitled to vote for a borough, omitted to state the amount of rent and the address of his landlord. These particulars were supplied at the revision: but the revising barrister declined to amend under s. 28, sub-s. 2:—*Held*, that, this being the case of a mistake, not in a "list of voters," but in a list or catalogue of claims, it was not obligatory on the revising barrister to correct or amend it, but discretionary only; and, he having exercised his discretion for reasons which the Court thought satisfactory, his decision was affirmed. Pickard *v.* Baylis - - - - - 235

3. —— *Borough Vote—Notice of Objection—Description of Objector, under* 41 & 42 *Vict. c.* 26—*Reference to List—Power of Amendment under s.* 28, *sub-s.* 2.] A notice of objection was signed "H. J., of 36, New King Street, on the list of voters for the parish of W." There are two lists of parliamentary voters for the parish of W., viz. list No. 1, Division 1, being the list of persons entitled under the Reform Act, 1832, or by s. 3 of the Representation of the People Act, 1867, and list No. 3, being the list of lodgers under 41 & 42 Vict. c. 26, s. 22. There are also two lists of burgesses for the parish of W. The name of H. J. was on the parliamentary list, No. 1, Division 1.—The revising barrister held the notice to be invalid for omitting to state that the objector was on the "parliamentary" list, and also for omitting to define on which of the several lists his name appeared; and that he had no power to amend:—*Held*, that the objector was not bound to state upon which of the several lists his name appeared; but that it was enough if he followed the words of the note appended to the form (I.), No. 2, in the schedule to 41 & 42 Vict. c. 26.—But, *semble*, that the omission to state that the objector was on one of the "parliamentary" lists was fatal, but was a mistake which the revising barrister had power to amend, and ought to have amended, under s. 28, sub-s. 2. James *v.* Howarth [225

4. —— *Borough Vote—Qualification—Parish, Alteration of*—2 & 3 *Wm.* 4, *c.* 45, *ss.* 5–7; *c.* 64, *s.* 35, *Sched. O*—39 & 40 *Vict. c.* 61, *ss.* 1, 3, 4.] A right to vote in respect of a qualification within an isolated part of a parish at parliamentary elections for a borough comprising that part is not affected by an order made under the Divided Parishes and Poor Law Amendment Act, 39 & 40 Vict. c. 61, amalgamating the part with a parish beyond the limits of such borough. Foster *v.* Medwin - - - - - 87

5. —— *County Vote — Equitable Interest in Copyhold Lands*—2 *Wm.* 4, *c.* 45, *s.* 26—30 & 31 *Vict. c.* 102, *s.* 5.] A testator devised copyhold cottages to trustees upon trust to sell and to stand possessed of the proceeds and pay the interest, dividends, &c., to his wife during her widowhood, and, after her decease or marriage, upon trust for his children who should be living at the time of his decease; the share of a son or sons to be vested

PARLIAMENT—*continued.*

and payable to him or them on attaining twenty-one, and the share of a daughter to be vested at twenty-one or marriage, and to be to her sole and separate use.—The wife predeceased the testator; and the surviving trustees were admitted as customary tenants of the cottages.—The testator left three sons and a daughter: the latter married and had issue, who were infants. Pursuant to a verbal arrangement amongst themselves (in which agreement the daughter's husband had concurred, but to which the trustees were no parties), the cestuis que trustent agreed to keep the cottages unconverted; and the rents (about 50*l.* per annum) were received by the trustees and divided amongst them;—*Held*, that, inasmuch as one of the cestuis que trustent was a married woman and had issue who were infants, no election could be made to take the cottages in their actual state, and so determine and extinguish the converting trust; and consequently that the testator's sons had not such an estate (legal or equitable) in the copyhold cottages as to entitle them to be registered as voters for the county under 2 Wm. 4, c. 45, s. 26, and 30 & 31 Vict. c. 102, s. 5. Spencer *v.* Harrison - - - - - 97

6. —— *County Vote—Freeholder—Residence —Absence during Service under Articles to a Solicitor*—2 & 3 *Wm.* 4, *c.* 45, *s.* 31.] By 2 & 3 Wm. 4, c. 45, s. 31, which makes provision for freeholders voting for a city being a county of itself, no freeholder shall be registered in any year "unless he shall have resided for six calendar months next previous" to a certain day in such year, within such city.—During part of the prescribed period of six months, a freeholder who had a bedroom kept for his exclusive use in his father's house within such a city was absent, serving under articles to a solicitor in London:—*Held*, that, being bound by the articles, he could not be deemed to have had either the liberty or intention to return to the room whenever he liked, and therefore had not "resided" within the city for the required time within the meaning of the Act. Ford *v.* Drew 59

7. —— "*Declaration as to amending Misdescription in List*"—*Change of Qualification—Powers of Amendment*—41 & 42 *Vict. c.* 26, *ss.* 24, 28—*Sched., Form M.*] The appellant's qualification being described on a list of voters as a "house," "8, Birley Place," he made and sent in a "declaration for amending misdescription," under 41 & 42 Vict. c. 26, s. 24, Schedule, Form M, that the correct description was "houses in succession," "8, Birley Place and 9, Birley Place:"—*Held*, that the revising barrister was right in expunging the appellant's name from the list, for there had been an alteration in the nature of the qualification, and to substitute "houses in succession" for "house" would be such a change in the description of the qualifying property as was not authorized by s. 28 of the Act.—Porrett *v.* Lord [65

8. —— *Election Petition—Changing Place of Trial—Parliamentary Elections Act*, 1868 (31 & 32 *Vict. c.* 125), *s.* 11, *sub-s.* 11.] Something more than mere inconvenience must be shewn, to induce the Court to change the place for the trial of an election petition from the county or borough where the election has taken place.—The order for that

PARLIAMENT—*continued.*

purpose must be made by the Court, and not by a judge at chambers. Collins *v.* Price - 544

9. —— *Election Petition — Interrogatories — Parliamentary Elections Act*, 1868 (31 & 32 *Vict. c.* 125), *ss.* 2 *and* 26—*Rule* 44 *of the rules of Michaelmas Term*, 1868.] Neither the Court nor a judge at chambers has power to allow interrogatories to be administered to a sitting member, under ss. 2 and 26 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125) or the 44th rule of Michaelmas Term, 1868.—*Semble* (per Lord Coleridge, C.J., and Grove, J.), that the power given to the election judges on the rota by s. 25 of the Parliamentary Elections Act, 1868, does not enable them to make a rule for exhibiting interrogatories. Wells *v.* Wren - - - - 546

10. —— *Election Petition — Withdrawal of Petition—Parliamentary Election Act*, 1868 (31 & 32 *Vict. c.* 125), *s.* 36—*Form of Affidavit.*] In the affidavits used upon an application under s. 36 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), for leave to withdraw a petition against the return of a member, it is not enough for the petitioner and respondent to swear that, "to the best of their knowledge, information, and belief, the withdrawal of or application to withdraw the petition is not the result of any corrupt arrangement, or in consideration of the withdrawal of or application to withdraw any other petition." They must make a positive affidavit that they have not been parties to any corrupt arrangement, and deny to the best of their knowledge, information, and belief, that any such arrangement has been made by their agents. The existence of any such arrangement must also be denied by the agents themselves. Johnson *v.* Rankin. Saul Isaacs *v.* Seeley - - - - 553

11. —— *Notice of Objection, Form of—Note—Specification of List—Franchise List—Parochial List*—41 & 42 *Vict. c.* 26, *Schedule, Form I.*] Notices of objection given in the Forms of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26) Schedule, Form I., satisfy the requirements of the note to those Forms that they "should specify the list to which the objection refers," by specifying such list with regard to the various kinds of franchise, e.g. the list of freeholders, occupiers, or lodgers, and need not specify the particular parochial list to which the objection refers. Mortlock *v.* Cropper 73

PARTNERSHIP—*Style of—Name of Individual Member—Signature to Bill of Exchange—Liability of Firm—Evidence.*] Where a signature is common to an individual and a firm of which the individual is a member, a bonâ fide holder for value, without notice whose paper it is, of a bill of exchange with such signature attached, has not an option to sue either the individual or the firm. But there is a presumption that the bill was given for the firm and is binding upon it, at least, where the individual carries on no business separate from the business of the firm of which he is a member: this presumption, however, may be rebutted by proof that the bill was signed not in the name of the partnership but of the individual for his private purposes, and it is immaterial that the bonâ fide holder took the bill as the bill of the proprietors of the business carried on by the

PARTNERSHIP—*continued.*

partnership whoever they might be, and not merely as the bill of the individual.—B. & M. carried on business in partnership. M. was a dormant partner, and B. was the only ostensible partner, the business being carried on in his name alone. B. entered into accommodation transactions for his private purposes, and, without the authority of M., accepted and indorsed bills of exchange in his own name only. B. in becoming party to these bills, did not intend to bind M., but he considered the bills as private transactions and signed them merely on his own behalf. The plaintiffs became bonâ fide holders for value of the bills signed by B., and took the bills as the bills of the proprietors of the business carried on by the partnership, and not merely as the bills of B. Besides the business of the partnership B. was not engaged in any business:—*Held*, affirming the judgment of the Common Pleas Division, that the plaintiffs could not hold M. liable upon the bills accepted and indorsed by B. Yorkshire Banking Company *v.* Beatson - C. A. 109

PETITION—Election of town councillor—Notice to respondent - - - 135
See Municipal Corporation. 3.

—— Withdrawal—Parliamentary Election 553
See Parliament—Election Petition.

POOR RATE—*Separate Rateability of a Right of Shooting, when severed from the Occupation of the Land—Rating Act*, 1874 (37 & 38 *Vict. c.* 54), *s.* 6, *sub-s.* 2.] Under 37 & 38 Vict. c. 54, *s.* 6, sub-s. 2, where owner of land lets the right of sporting over part of the land which he retains in his own occupation, the lessee may be rated in respect of the right of sporting. Kenrick *v.* Overseers of Guilsfield - - - - - 41

PRACTICE—*Claim—Credits — Particulars of—Order for.*] A plaintiff may be ordered to give particulars of items which are, in his claim, placed to the credit of the defendant. Godden *v.* Corsten [17

2. —— *Costs—Power of Judge at Nisi Prius, without Application, to disallow Plaintiff's Costs—Rules of the Supreme Court, Order LV., rule* 1.] At the trial of an action of tort the jury found for the plaintiff and assessed the damages at 12*l.*: the counsel for the defendant was about to apply for a direction to deprive the plaintiff of the costs, but, before he did so, the judge made an order to that effect. The plaintiff's counsel was present and objected to the order being made:—*Held*, that the order depriving the plaintiff of costs was lawfully made.—By Grove and Lopes, JJ. (in the Common Pleas Division), that the judge might under Rules of the Supreme Court, Order LV., make the order without any application being made to him.—By Bramwell, Brett, and Cotton, L.JJ. (in the Court of Appeal), that what occurred at the trial was equivalent to an application by the defendant and to shewing good cause why the order should be made. Collins *v.* Welch [C. A. 27

3. —— *Interrogatories to Corporation—Answer by Town Clerk—Solicitor—Privilege.*] Interrogatories, delivered in an action against a corporation to the town clerk, or other their proper officer, were answered by the town clerk, who objected to

PRACTICE—*continued.*
give information on the ground that it was derived from communications which had been made to him as solicitor in the action, and were therefore privileged:—*Held*, that as the corporation had elected to answer through him, the objection could not be maintained. Mayor of Swansea *v.* Quirk - - - - - - - 106

4. —— *Interrogatories—Relevancy and Materiality—Order XXXI., rules* 8, 19.] The plaintiffs claimed 1732*l.* 10*s.*, the price of three horses alleged to have been sold by them to the defendant. By his statement of defence the defendant denied that the horses were sold to him, and further alleged that the prices charged were excessive, and that the horses were ordered by his wife without any authority to pledge his credit for them. Reply, that the horses were necessaries suitable to the estate and degree of the wife.—The following interrogatories were administered to the plaintiffs:—1. State the date when you purchased each of the horses alleged by you to have been sold to the defendant on, &c.—2. State, if you did in fact purchase each or any of the said horses, and were in fact the owner of the same, when, as you allege, you sold them to the defendant.—3. Give the exact amount you paid or had contracted to pay for each of the said horses.—4. If you were not the owners of the said horses or any of them at the date when, as you allege, you sold them to the defendant, state specifically and in detail how and under what circumstances you had each and every of the said horses in your custody, possession, or control.—5. State specifically and in detail the date or dates upon which you received the said horses into your control:—*Held*, that the 1st and 3rd interrogatories were relevant and material to the issues, and ought to be answered; but that the 2nd, 4th, and 5th were inadmissible. Sheward *v.* Lord Lonsdale 47

5. —— *Sheriff—Attachment for not returning a Writ of fi. fa.—Order XLIV., rule* 2.] An attachment against the sheriff for not returning a writ of fi. fa. is not, as formerly, obtained as of course; but, since Order XLIV., rule 2. can only be applied for "on notice." Jupp *v.* Cooper 26

6. —— *Stay of Proceedings at the Instance of the Plaintiffs in several Actions until one tried as a Test Action—Order XXIX., rule* 1.] Thirty-eight actions having been brought by different persons against the defendants as directors of an incorporated company, charging misappropriation of moneys advanced by the plaintiffs in different amounts and at different times, but all under similar circumstances:—*Held*, upon the authority of *Amos* v. *Chadwick* (4 Ch. D. 869 and 9 Ch. D. 459), that it was competent to a judge at chambers, upon the application of the plaintiffs, to stay the proceedings in thirty-seven of the actions until after the trial of the thirty-eighth as a test action, —proper provision being made in case that action did not satisfactorily dispose of the question in all. Bennett *v.* Lord Bury - - - 339

7. —— *Writ of Summons, Special Indorsement on, under Order III., rule* 6—*Judgment signing, under Order XIV., rule* 1.] A special indorsement on a writ of summons claimed 49*l.*, and stated the particulars with dates and amounts to be "To goods;" it also contained an item for

PRACTICE—*continued.*
"Bank draft returned," which was entered both on the debit and credit side of the particulars, and it further contained a sum for "notary charges on same;"—*Held*, a sufficient indorsement under Order III., rule 6, to entitle the plaintiff to sign judgment under Order XIV., rule 1.] Smith *v.* Wilson - - - - - C. A. 25

—— County Court—Appeal—Grounds of judgment - - - - 308
See Bill of Sale. 4.

—— Third parties—Discovery - - 194
See Church. 2.

PRESCRIPTION—Dedication of chancel - 390
See Church.

—— Usage to dredge oysters—Navigable river
See Fishery. [431

PRIORITY — Administration suit — Judgment creditor - - - - 337
See Executor—Administrator.

PRIVILEGE — Interrogatories — Corporation — Solicitor - - - - 106
See Practice. 3..

PROSPECTUS—Concealment of contract - 455
See Company.

RAILWAY — *Continental Ticket — Book of Coupons—Condition inside—Notice of.*] Outside the cover of a paper book of coupons forming a railway ticket, issued to the plaintiff by the defendants, was printed the name of their railway, the words "Cheap return ticket, London to Paris and back, Second class." and a statement of the period and journey for which the ticket was available, but no reference to the inside of the cover. On the inside, and apparent on turning the leaf, was a condition limiting the responsibility of the defendants to their own trains.—The plaintiff having been injured while travelling by virtue of the ticket, in a French train, sued the defendants. They set up the condition. The plaintiff had not read and did not know of it.—The jury were directed that if it was brought to his notice it would afford a defence, and, on being asked the question, suggested in *Parker* v. *South Eastern Ry. Co.* (2 C. P. D. 416) whether what was done by the company was reasonably sufficient to bring the condition to the notice of the plaintiff, answered that it was not, and found a verdict in his favour. He moved for judgment.—*Held*, distinguishing *Henderson* v. *Stevenson* (L. R. 2 H. L. Sc. 470), that the whole book was the contract accepted by the plaintiff, and that he, therefore, could not reject the condition which was one of its terms, and that judgment should be entered for the defendants. Burke *v.* South Eastern Railway Company - - 1

2. —— *Passenger — Ticket issued by One Company—Injury whilst travelling by Train of Another—Negligence—Liability of Carriers.*] The defendants, a railway company, had running powers between H., a station upon their own line, and R., a station of the S. company, over the line of that company. The defendants and the S. company divided the profits of the traffic between H. and R. The plaintiff took a return ticket from R. to H., which was issued to him by a clerk of the S. company. Upon the return

RAILWAY—*continued.*
journey from H. to R. he travelled in a train belonging to the defendants, and driven by their servants. Owing to the carriage being unsuited to the platform at R., which belonged to the S. company, the plaintiff sustained bodily injury. At the trial the jury found that the defendants had been guilty of negligence:—*Held*, that an action lay against the defendants, for they, having permitted the plaintiff to travel by their train, were bound to make provision for his safety. Foulkes *v.* Metropolitan District Railway Company - - - - C. A. 157

REGISTRATION—Bill of sale - - 56
See Bill of Sale. 6.

RULES—Order III., r. 6 - - - 25
See Practice. 7.

—— Order XIV., r. 1 - - - 25
See Practice. 7.

—— Order XXIX., r. 1 - - - 339
See Practice. 6.

—— Order XXXI., rr. 8, 19 - - - 47
See Practice. 4.

—— Order XLIV., r. 2 - - - 26
See Practice. 5.

—— Order LV., r 1 - - - - 27
See Practice. 1.

SALE OF GOODS—*Goods sold and delivered—Conditional Sale of a Horse—Death of the Horse before the Sale became absolute.*] A horse was sold by the plaintiff to the defendant upon condition that it should be taken away by the defendant and tried by him for eight days, and returned at the end of eight days if the defendant did not think it suitable for his purposes. The horse died on the third day after it was placed in the defendant's stable, without fault of either party:—*Held*, by Denman, J., that the plaintiff could not maintain an action for the price, as for goods sold and delivered. Elphick *v.* Barnes - 321

—— Contract by letter—Withdrawal of offer 344
See Contract.

SCHOOL BOARD—Election of member—Corrupt practices—Petition - - 191
See Elementary Education.

SET OFF—Action on marine policy - 34
See Insurance (Marine).

SHERIFF—Attachment for not returning writ—Notice - - - - 26
See Practice. 5.

SHIP—*Charterparty—Contract to carry—Sale of Goods by Master of Ship.*] On the 24th of June the defendants, who were shipbrokers, wrote to the plaintiffs, offering them "room" in a ship called *F. K. Dumas* for certain cement and stone from London to Callao. On the 25th of June the defendants chartered the ship for the voyage, the charterparty providing, inter alia, that the whole ship should be at the disposal of the charterers, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be responsible to all whom it might concern, as if the ship were loaded at her berth by and for the owners independently of the charter; that the master was to sign bills of lading at any rate of

SHIP—*continued.*
freight the charterers might require without prejudice to the charterparty; and that the charterers' responsibility, except for freight, should cease on the vessel being loaded. On the 26th of June an agreement was made between the defendants, acting for the owners of the *F. K. Dumas*, and the plaintiffs, that the former should receive on board cement and stone at certain freight from London to Callao, and sail on a certain day: freight to be paid one half on signing bills of lading, and the remainder on final discharge at Callao.—The cement and stone were shipped, the half freight paid, and the master signed bills of lading making the remainder payable at Callao. On her voyage the ship, being damaged by bad weather, put into an intermediate port, where the vessel was condemned. The master, being unable to forward the plaintiffs' goods to their destination, sold them. In an action against the defendants for their value, the jury found that the sale was not justified:—*Held*, affirming the judgment of Denman, J., that on the construction of the above documents there was no contract between the plaintiffs and the defendants for the carriage of the goods from London to Callao. Wagstaff *v.* Anderson - - - - - 171

2. —— *Charterparty—To deliver at a given Port, "or so near thereto as the Ship could safely get"—Custom inconsistent with the Contract.*] By a charterparty the vessel was to deliver at H., "or so near thereto as she could safely get;" to discharge as customary; the cargo to be brought to and taken from alongside the ship at merchant's risk and expense. The draught of water of the vessel with the cargo on board was too great to allow her to reach H. The nearest point to which she could safely get was S., where the merchant refused to accept delivery of any part of the cargo. In order to lighten the vessel, part of her cargo was discharged into lighters at S. and sent in them to H. Her owner having sued the charterer to recover the lighterage expenses:—*Held*, that a defence alleging that by the custom of the port of H. the defendant was not bound to take delivery elsewhere than at H. was bad on demurrer, inasmuch as it sought to set up a custom inconsistent with the written contract, and that the plaintiff was entitled to recover the lighterage expenses. Hayton *v.* Irwin C. A. 130

3. —— *Deviation—Charterparty.*] A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property.—The defendants' ship was chartered by the plaintiffs to carry a cargo of wheat from Cronstadt to the Mediterranean, the usual perils of the sea excepted. Whilst on her voyage she sighted and went to the assistance of a vessel in distress, called the *Arion*, and the master, in consideration of 1000*l.*, agreed to tow her into the Texel, which was out of his direct course. Whilst so doing the defendants' vessel was stranded, and ultimately (with her cargo) was totally lost. The jury found that it was not reasonably necessary to take the *Arion* to the Texel in order to save the lives of those on board her; but it was reasonably necessary to do so in order to save her and her cargo:—*Held*, that the deviation was unjustifiable, and consequently that the plaintiffs were

SHIP—*continued.*
entitled to recover the value of the cargo against the defendants as owners of the ship. Scaramanga *v.* Stamp - - - C. A. 295
SHOOTING, RIGHT OF—Lessee—Poor rate 41
See Poor Rate.
STATUTES—2 & 3 Wm. 4, c. 45, ss. 5–7 87
See Parliament. 4.
—— —— s. 31 - - - - 59
See Parliament. 6.
—— —— s. 26 - - - - 97
See Parliament. 5.
2 & 3 Wm. 4, c. 64, s. 35 - - - 87
See Parliament. 4.
2 & 3 Wm. 4, c. 71, ss. 3, 4 - - 390
See Church.
3 & 4 Wm. 4, c. 42, s. 3 - - - 429
See Limitations. 1.
3 & 4 Wm. 4, c. 27, s. 7 - - - 368
See Limitations. 2.
5 & 6 Wm. 4, c. 76, s. 28 - - - 183
See Municipal Corporation.
14 & 15 Vict. c. 97, s. 11 - - - 194
See Church. 2.
17 & 18 Vict. c. 36, s. 1 - - - 56
See Bill of Sale. 6.
30 & 31 Vict. c. 102, s. 5 - - - 97
See Parliament. 2.
30 & 31 Vict. c. 131, s. 38 - - - 455
See Company.
31 & 32 Vict. c. 86, s. 1 - - - 34
See Insurance (Marine).
31 & 32 Vict. c. 125, ss. 2, 26 - - 546
See Parliament—Election Petition.
—— —— s. 11, sub-s. 11 - - - 544
See Parliament—Election Petition.
—— —— s. 36 - - - - 553
See Parliament—Election Petition.
32 & 33 Vict. c. 62 - - - 366
See Debtors Act.
32 & 33 Vict. c. 71, s. 126 - - - 354
See Bankruptcy. 2.
33 & 34 Vict. c. 75, ss. 31, 33 - - 191
See Elementary Education.
35 & 36 Vict. c. 33 - - - 191
See Elementary Education.
—— —— s. 13 - - - - 253
See Municipal Corporation. 2.
35 & 36 Vict. c. 60, s. 2. - - - 191
See Elementary Education.
35 & 36 Vict. c. 76, s. 52 - - - 361
See Mine.
35 & 36 Vict. c. 94, s. 25 - - - 50
See Licensing Acts.
36 & 37 Vict. c. 86, s. 26, sch. 2 - - 191
See Elementary Education.
37 & 38 Vict. c. 49, s. 30 - - - 50
See Licensing Acts.
37 & 38 Vict. c. 54, s. 6, sub-s. 2 - - 41
See Poor Rate.
37 & 38 Vict. c. 57 - - - - 368
See Limitations. 2.
37 & 38 Vict. c. 62 - - - - 410
See Infant.

STATUTES—*continued.*
38 & 39 Vict. c. 40, s. 1, sub-s. 2 - - 183
See Municipal Corporation.
—— —— —— sch. 1, form 2 - - 253
See Municipal Corporation. 2.
38 & 39 Vict. c. 55, ss. 94, 95, 96, 99, 104 481
See Landlord and Tenant. 2.
—— —— s. 150 - - - - 248
See Local Government Acts. 2.
—— —— ss. 150, 257 - - - 272
See Local Government Acts.
39 & 40 Vict. c. 61, ss. 1, 3, 4 - - 87
See Parliament. 4.
39 & 40 Vict. c. 81, s. 12 - - - 7
See Banker.
41 & 42 Vict. c. 26, s. 28, sub-s. 2 - 225
See Parliament. 3.
—— —— —— sub-s. 7 - - - 231
See Parliament.
—— —— sch. form I. - - - 73
See Parliament. 8.
—— —— ss. 24, 28 - - - 65
See Parliament. 7.
—— —— s. 28, sub-s. 2 - - - 235
See Parliament.
—— —— s. 41 - - - - 253
See Municipal Corporation. 2.
41 & 42 Vict. c. 31, s. 4 - - - 308
See Bill of Sale. 4.
—— —— s. 8 - - - - 327
See Bill of Sale. 7.
—— —— ss. 8, 10 - - - - 20
See Bill of Sale. 2.
41 & 42 Vict. c. 77, s. 23 - - 211, 351
See Highway.

THIRD PARTIES—Discovery—Practice - 194
See Church. 2.

ULTRA VIRES—Borrowing powers—Liability of directors - - - - 331
See Building Society.

VENTILATION—Coal Mines Regulation Act
See Mine. [361

WASTE—Accidental destruction of premises—Liability to rent - - - 507
See Landlord and Tenant. 3.

WAY, RIGHT OF—*General Words descriptive of an Easement—Sale by Auction—Misrepresentation by Auctioneer (unauthorized but not wilful) as to the Existence of a Right of Way over adjoining Land.*] By indenture of lease of the 23rd of September, 1878, one Berridge demised to Brett a public-house at Hampstead, "together with all ways, waters, watercourses, drains, cellars, vaults, paths, passages, lights, easements, profits, privileges, commodities, advantages, and appurtenances whatsoever to the said premises belonging or in any wise appertaining." At the rear of the premises was a path across the garden to a doorway in the boundary wall which opened on to a private road (the property of Berridge) leading to Hamp-

WAY, RIGHT OF—*continued.*
stead Heath.—On the 1st of October, 1878, Berridge (pursuant to an agreement of November, 1867) granted to the defendant Clowser a lease for ninety-nine years of land which comprised the private road leading from the back of the public-house to Hampstead Heath; and on the 9th of October in that year Clowser built up the doorway in the boundary wall. This way had, by special agreement between himself and his lessor Clowser, for several years been used by one Haughton, a former tenant of the public-house, whose tenancy had been determined in June, 1878:—*Held*, that the way in question not being a way of necessity did not pass to Brett by the general words in the lease of September, 1878; and that the defendant Clowser was not estopped from denying the existence of the alleged right of way by having allowed Haughton to use it whilst he was the occupier of the public-house.—In August, 1878, the defendant Berridge offered for sale by public auction a lease of the public-house before mentioned. By the conditions of sale it was provided that "the lease to be granted shall contain the covenants, clauses, and provisions, and be in the form or to the effect set forth in the draft lease which will be produced on the sale and may be seen at the office of the auctioneers for seven days previous to the day of sale," and that "the property is presumed to be correctly described; but, as the premises may be viewed and the draft lease inspected at the office of the auctioneers, the purchaser shall be deemed to have bought with full knowledge of the contents thereof; and no error, misdescription, or omission in the particulars shall annul the sale, and no compensation shall be required for any such error, misdescription, or omission." There was no reference either in the conditions of sale or in the draft lease to the existence of any right of way from the garden of the public-house to Hampstead Heath; but, at

WAY, RIGHT OF—*continued.*
the time of the sale, the auctioneer bonâ fide, but without any authority from Berridge, and acting entirely upon an inference drawn by himself from the appearance of the premises, and believing that there was a right of way through the same and over the private road and so to Hampstead Heath, stated publicly that there was such a way, and spoke of it as enhancing the value of the premises:—*Held*, that the evidence of what passed at the time of the sale was admissible as against the vendor; but that no action could after the completion of the purchase be maintained against him to recover compensation for this innocent misrepresentation by the auctioneer. Brett *v.* Clowser - - - - - - 376

—— Vendor and purchaser—Misrepresentation by auctioneer - - - 376
See Way, Right of.

WORDS—"At the trial" - - - 139
See County Court.

—— "Counter-claim"—"Defence" - 34
See Insurance (Marine).

—— "Excessive weight" - - 211, 351
See Highway.

—— "Extraordinary traffic" - 211, 351
See Highway.

—— "Fronting, adjoining, or abutting" - 248
See Local Government Acts. 2.

—— "Private friends" - - - 50
See Licensing Acts.

—— "Set-off" - - - - - 34
See Insurance (Marine).

—— "So near thereto as she may safely get" - - - - - 130
See Ship. 2.

WRIT—Form of special indorsement - 25
See Practice. 7.

END OF VOL. V.

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